SUPREME COURT OF THE UNITED STATES

No. A-493

NEW YORK,

Petitioner,

—v.—

AMIR MANOCHERIAN, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended further to and including February 17, 1995.

/s/ Ruth Bader Ginsburg
Associate Justice of the
Supreme Court of the United States

Dated this 10th
day of January, 1995.

SUPREME COURT OF THE UNITED STATES

No. A-493

NEW YORK,

Petitioner,

—v.—

AMIR MANOCHERIAN, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended further to and including March 19, 1995.

/s/ Ruth Bader Ginsburg
Associate Justice of the
Supreme Court of the United States

Dated this 13th
day of February, 1995.

STATE OF NEW YORK
COURT OF APPEALS

1 No.135

AMIR MANOCHERIAN, et al,

Petitioner,

—v.—

LENOX HILL HOSPITAL, & c., et al.,

Respondents,
et al.,
Defendants

OPINION

This opinion is uncorrected and subject to revision before publication in the *New York Reports*.

Gary M. Rosenberg, for appellants.
Edward S. Kornreich, for respondents.
June Duffy, for Attorney General.
Pacific Legal Foundation, *amicus curiae*.

BELLACOSA, J.:

Plaintiffs, owners of several New York City rent stabilized apartments at issue here, seek summary judgment to declare Chapter 940 of the Laws of 1984 unconstitutional and related

relief. That enactment requires the owners to offer renewal leases to defendant-respondent, Lenox Hill Hospital, a not-for-profit hospital enterprise on the Upper East Side of Manhattan, for apartments occupied by some of the hospital's employees. Supreme Court and the Appellate Division upheld the validity of the statute and plaintiffs appeal as of right on constitutional grounds and a two-Justice dissent.

The precise issue for us to decide is whether Chapter 940 of the Laws of 1984 substantially advances a legitimate State interest, justifying the State's imposition of distinctive encumbrances and obligations on plaintiffs' private property rights. The statute purports to justify and accomplish its objective through an amendment tied to the general purposes of the Rent Stabilization Law (RSL) and Emergency Tenant Protection Act (ETPA). While these twin enactments co-exist to remedy a persisting emergency housing shortage, the particular statute under review perpetuates a small, privileged housing stock. In terms, actuality, and functional impact, the statute does not protect and benefit specific occupant subtenants, but rather erects a subsidized housing regime for Lenox Hill Hospital's preferential allotment.

We conclude that this legislation suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest (*see, Seawall Assocs. v City of New York*, 74 NY2d 92, 107, *cert denied* 493 US 976; *Rent Stabilization Assn. v Higgins*, 83 NY2d 156, 174, *cert denied* ___ US ___, 114 S Ct 2693 [6-13-94]; *see also, Nollan v California Coastal Commn.*, 483 US 825). Thus, we reverse the order of the Appellate Division.

I.

This long-standing dispute cannot be understood or resolved without some historical background and context (*see, 520 E. 81st St. Assocs. v Lenox Hill Hosp.*), 157 AD2d 138, *revg* 142 Misc 2d 723, *revd on other grounds* 77 NY2d 944). The rent stabilization system began in 1969 to ameliorate, over time, the intractable housing emergency in the City of

New York. The housing shortage was ascribed to "continued high demand, attributable in part to new household formation and decreasing supply" (Local L 1969, No. 16; *see*, Administrative Code of City of New York § 26-501). By regulating rents and providing occupants with statutory rights to tenancy renewals under rent stabilization—a "less onerous form of rent regulation"—the State intended to protect dwellers who could not compete in an overheated rental market, through no fault of their own (*Sullivan v Brevard Assoc.*, 66 NY2d 489, 494; *see, Braschi v Stahl Assocs. Co.*, 74 NY2d 201, 214 [concurring opinion]). The RSL has been maintained "to prevent uncertainty, hardship and dislocation," and to "forestall profiteering, speculation and other disruptive practices" (McKinney's Uncons Laws of NY § YY 51-1.0 [renum § 26-501]).

Unlike rent control, which places stricter price controls on owners and leaves many dwellings only marginally profitable, the State, in enacting rent stabilization, seeks to insure more balanced terms under which owners may apply for regulated rent increases and to protect primary occupants. Thus, in 1971, the Legislature exempted from rent stabilization regulation all housing accommodations not "occupied by the tenant in possession as his [or her] primary residence" (L 1971, ch 373). Similar language was incorporated into § 5(a)(11) of the ETPA of 1974 (*see*, L 1974, ch 576, § 4). The phrase "tenant in possession" included both the tenant of record and any subtenant residing in the regulated apartment. In 1983, however, the Omnibus Housing Act (OHA) amended Rent Stabilization Law § 26-504(a)(1)(f) to exempt from the RSL dwelling units "not occupied by the tenant, *not including subtenants or occupants*, as his [or her] primary residence" (L 1983, ch 403, § 41 [emphasis added]). Thus, under OHA, the named leaseholder had to occupy the apartment as a primary residence in order to qualify for a renewal lease. While the subletting of apartments was still permitted, Administrative Code § 26-511(c)(12) added that such tenants could not sublet units for more than a total of two years out of a four-year period, and only on the establishment of primary residency.

Next came Chapter 940 of the Laws of 1984 (L 1984, ch 940, codified at Administrative Code of City of NY § YY 51-3.0 [renum § 26-504]). It was enacted six months after the passage of Chapter 403 and exclusively exalts the renewal rights of not-for-profit hospitals, which had formerly subleased rent stabilized apartments to qualified hospital employees. Section 1 of Chapter 940 amended the non-primary RSL § 26-504(f), providing "[w]here a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodation by such hospital shall be deemed to be tenants." Thus, under Chapter 940, subtenants of the primary tenant, a nonoccupying, not-for-profit hospital, were deemed qualified tenants in specific contradiction of the general purport of the 1983 OHA reforms. Chapter 940 further grants not-for-profit hospitals the right to sublet apartments to affiliated employees without first obtaining an owner's consent and without requiring the hospital itself to maintain these apartments as a primary residence. Indeed, unlike any other regulated tenants, all of whom are authorized to sublet for only two out of every four years, the sublets by the not-for-profit hospital to its selected and variable employees is durationally unrestricted and open-ended. This is a unique and additional preference accorded no one else similarly situated. Moreover, the hospital's special privileges last for as long as its unilaterally-controlled corporate existence.

The legislative history of Chapter 940 reveals that Lenox Hill Hospital was the principal agent in urging the amendment (*see*, Senate Debates, S. Bill No. 9983, June 28, 1984 ["(t)his bill has been introduced at the request of Lenox Hill Hospital in New York City * * * (and i)ts purpose is to enable Lenox Hill to have the right to renewal leases"]). The salutary motivation was the preservation of safe, convenient, affordable housing for hospital staff (*see*, Governor's Bill Jacket, Letter from Lenox Hill Hospital [dated 7-27-84,] at 29). The primary and real beneficiary of this legislation, however, is Lenox Hill Hospital, not actual dwellers. The latter are only incidentally benefitted and may be evicted under the exclu-

sive control or at the whim of their employer, Lenox Hill Hospital, to which the Legislature transferred significant, distinctive, apartment ownership prerogatives without its having to endure the burdens and costs of ownership.

The affected apartment owners sued, believing that Chapter 940 could not constitutionally mandate that they provide Lenox Hill Hospital with these benefits under perpetual renewal leases. Supreme Court, in the phase of the litigation with which we are now dealing, dismissed the complaint. It held that Chapter 940 did not constitute a physical taking since the owners had previously and voluntarily opened their premises to the hospital's prime tenancy. Supreme Court also found no regulatory taking and concluded that Chapter 940 advanced the principal goal of the RSL (154 Misc 2d 982). The Appellate Division (196 AD2d 728), with two Justices dissenting, affirmed for the reasons stated by Supreme Court.

II.

Elementary and strong constitutional principles protect private property rights and govern takings of property for public use without just compensation. They evolved " 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' " (*Penn Cent. Transp. Co. v New York City*, 438 US 104, 123, *quoting Armstrong v United States*, 364 US 40, 49; *Seawall Assocs v City of New York*, 74 NY2d 92, 101, *cert denied* 493 US 976, *supra*).

While there is no "precise mathematical calculation" for determining when an adjustment of rights has reached the point when "justice and fairness" requires that compensation be paid (*Dolan v City of Tigard*, ___ US ___, 114 S Ct 2309 [June 24, 1994]), in *Seawall Assocs. v City of New York* (*supra*), this Court implemented the doubled-edged test for determining whether a regulatory taking has occurred. We held that a "burden-shifting regulation" will constitute a taking "(1) if it denies an owner economically viable use of his [or her] property, *or* (2) if it does not substantially advance

legitimate State interests" (*id.*, at 107, citing *Nollan v California Coastal Commn.*, 483 US 825, 834, *supra*; *see also*, *Agins v Tiburon*, 447 US 255, 260). Failure to measure up to either criterion can invalidate a governmental incursion or encumbrance on private property rights (*see*, *Seawall Assocs. v City of New York*, *supra*; *Lucas v South Carolina Coastal Council*, ___ US ___, 112 S Ct 2886, 2894; *Nollan v California Coastal Commn.*, *supra*; *Keystone Bituminous Coal Assn. v DeBenedictis*, 480 US 470, 485, 495; *Armstrong v United States*, 364 US 40, *supra*). We are governed by this framework and discern no analytical basis or precedential authority to drop below this floor of constitutional protection for property owners or to alter well-established substantive and procedural rubrics and guidance in this complex field. In particular, we are satisfied that even if the economic impact aspect of this test (*see, Hodel v Irving*, 481 US 704, 714) were not to be satisfied, that feature alone could not defeat the owners' interests and claims in a controversy such as this, without consideration and fulfillment of the substantial State interest and close causal nexus prong of the governing test, even as to regulatory takings.

This Court also recently expressed the view that the substantial State purpose for such legislation must be bound by a "close causal nexus" to survive scrutiny (*see*, *Rent Stabilization Assn. v. Higgins*, 83 NY2d 156, 174, *cert denied* ___ US ___, 114 S Ct 2693 [6-13-94], *supra*; *see also*, *Dolan v City of Tigard*, ___ US ___, 114 S Ct 2309, supra). The precedents, State and Federal, thus establish a constitutional minimum floor of protection which this Court lacks authority to diminish under the supremacy clause (*see*, Kaye, *Dual Constitutionalism in Practice and Principle*, February 1987 Cardozo Lecture, reprinted in 42 The Rec of The Assoc of the Bar of the City of New York 285, 289, 293, 294; *see also*, Brennan, *Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 NYU L Rev 535, 550 [1986] [the Federal Bill of Rights creates "a federal floor of protection"]).

While the typical taking occurs when the government acts to physically intrude upon private property, governmental regulations which limit owners' rights to possess, use or dispose of property may also amount to a "taking" of the affected property (*see, e.g., Agins v Tiburon*, 447 US 255, *supra*; *Nectow v City of Cambridge*, 277 US 183, 188; *Seawall Assocs. v City of New York*, 74 NY2d 92, 101, *cert denied* 493 US 976, *supra*). We held in *Seawall* that the challenged local law effected a regulatory taking and was unconstitutional because the burdens imposed on owners did not substantially advance the stated public aim of alleviating homelessness. The combined effect on the instant case of these principles gains inexorable momentum from the twin temples of the supremacy clause flowing from pertinent United States Supreme Court precedents and the *stare decisis* import of our own decisions.

The differing views of the members of the Court in this case derive principally from varying interpretations of governing precedents. As to Judge Ciparick's dissenting opinion, the difference is essentially one of application, but as to Judge Levine's, it is a profound difference from the Majority as to the understanding and interpretation of what the many governing precedents say and mean. Judge Levine's dissent discounts *Seawall* and casts unfortunate uncertainty on the governing precedents and principles, while the Majority is more confident as to the meaning and application of the governing law (*compare, Simpson v Loehmann*, 21 NY2d 305, 314 [Breitel, J., concurring opn]).

For example, there is no basis in *Nollan* itself for concluding that the Supreme Court decided to apply different takings tests, dependent on whether the takings were purely regulatory or physical. The Court promulgated a principle for all property and land-use regulation matters. A crucial threshold of analysis is that no taking occurs if a law "substantially advance[s] legitimate state interests" (*Nollan, supra*, at 834). In discussing the lack of a standard for determining what constitutes a "legitimate state interest," the Supreme Court specifically referred to non-physical regulatory takings cases

(*see*, *Nollan*, *supra*, citing *Agins v Tiburon*, 447 US 255, and *Penn Cent. Transp. Co. v New York City*, 438 US 104, *supra*). Further, the Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the "essential nexus" test. This suggests and supports a uniform, clear and reasonably definitive standard of review in takings cases (*see generally*, Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings LJ 335, 351). Indeed, Justice Brennan, in dissent in *Nollan*, expressly attributed to the Majority's holding in *Nollan* an impact on all regulatory takings cases, stating that the Court's "exactitude * * * is inconsistent with our standard for reviewing the rationality of a State's exercise of its police power for the welfare of its citizens" (*Nollan*, *supra*, at 842-843).

We conclude that Chapter 940 fails the test of substantially advancing a legitimate State Interest warranting the indeterminate and unjustifiable burden draped disproportionately on the particular owners' shoulders. That law, in the unusual development and circumstances of this case, must meet the constitutional safeguards on its own merits, not as an augmentation or complement to some generalized State interest found elsewhere in organic law or other statutes. Indeed, in significant respects, the particular statute contradicts two key goals of the RSL, to wit, occupant protection and eventual market redemption. These incongruities flow out of the transferral of power from a landlord to the employer of the actual occupants, and by the removal of the affected apartments entirely and permanently from marketplace availability or potentiality for other publicly interested or vying occupants at rent-stabilized rates.

The preservation of this Manhattan Upper East Side housing enclave for this privileged entity's benefit, albeit one engaged in a laudable and necessary eleemosynary health service function, cannot masquerade as general welfare legislation. Purporting to promote the general public welfare by enabling not-for-profit hospitals to continue to provide subsidized housing benefits to its chosen employees cannot sus-

tain the sweep and manner of the burden and confiscation effected against the few owners. Dissenting Justice Joseph P. Sullivan aptly framed the consequences as follows:

> A statutory interpretation which encourages the deployment of rent stabilized apartments in perpetuity as temporary dormitory space for an ever changing roster of hospital employees and promotes the displacement of these employees, some of whom may be long-term tenants, when they leave their employment does a disservice to rent stabilization's underlying purpose of protecting residential tenants from evictions during an acute housing shortage (196 AD2d 728, 732).

Lenox Hill Hospital, the State and our colleagues, Judges Levine and Ciparick, in their discrete dissenting opinions, urge that the requisite State interest is satisfied under the overall umbrella of the RSL and for the general health and welfare. We respectfully disagree. Judge Ciparick's dissenting opinion, in our view, does not give the holdings of the governing cases sufficient weight and import affecting the rationale and application we have advanced in the instant case. Judge Levine's approach, on the other hand, would seem to undermine *Seawall* or, *sub silentio*, place its precedential force in considerable doubt. Functionally, his analysis undercuts the legitimate State interest and close causal connection components of the well-established test. Moreover, the Majority has not, as Judge Levine asserts, adopted some variable of the standard governing tests or effected per se rules, applications or consequences (Dissenting opn, at 14).

The Supreme Court and this Court in the cited cases have ruled definitively in the fulfillment and exercise of an appropriate and necessary judicial review function, providing governing guidance for future cases, including this one. This traditional, fundamental, judicial role is not inimical to the prerogatives of the other Branches, but serves instead as the singular check and balance against governmental intrusion and overreaching (Ciparick, J., Dissenting opn, at 9). We, thus, resolve the controversy between the property owners

and their prime tenant, Lenox Hill Hospital, and thus settle the juridical relationship and rights as between them. The power equation should, therefore, not be characterized as between so-called greedy owners and needy dwellers. Rather, this case is about a one-dimensional financial award, subsidizing an employer which happens to be a non-occupying prime tenant and which wishes to avoid the concomitant burdens and responsibilities of ownership. Whatever consequences flow from our ruling, then, are the product of the law itself and its proper adjudication, not a societal or policy preference of our making.

The central, underlying purpose of the RSL is to ameliorate the dislocations and risk of widespread lack of suitable dwellings. Chapter 940 does not contribute to that desirable altruistic aim. It affects a tiny number of dwelling units. The effect of the statute is also quite ephemeral. These apartments were subject to rent stabilization prior to the enactment and will remain so, irrespective of the outcome of this long-standing dispute affecting a dwindling number of apartments, still in controversy in this litigation, with respect to the hospital's prime tenancy lease renewal entitlements. Accordingly, Chapter 940 fails to substantially or functionally prevent or relate to excessive rents and profiteering.

The realistic appraisal of Chapter 940 shows that it was sought and designed essentially to subsidize the non-profit hospitals special fringe benefit to some of its special health care employees. This common employer-employee dilemma has no legally or legitimately cognizable, causal relationship to the governmental intrusion on rights and entitlements due owners in the use and enjoyment of their properties in a rental market where demand intractably exceeds supply at affordable levels. Chapter 940 is really interposed as a special housing program, privately funded through those owners who happen to have previously rented to not-for-profit hospitals, like Lenox Hill Hospital.

The real goal of Lenox Hill and other arguably similarly situated not-for-profit hospitals is preserving a valuable perk for some of its health care workers. This has little to do with

a general State housing concern warranting Chapter 940's intervention. Rather, it sharply contradicts that indispensable legislative threshold and constitutional prerequisite. The fact that the State has acted through the "landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere 'economic regulation', which can disproportionally burden particular individuals" (*Pennell v City of San Jose*, 485 US 1, 22; *see also*, *Penn Cent. Transp. Co. v New York City*, 438 US 104, 124, *supra*).

III.

The exception created by this challenged enactment to the primary, occupying tenancy entitlement is infirm for additional reasons. A proffered State interest, which by definition should serve and protect the general populace on a fairly and uniformly applied basis, should not be countenanced when, as occurs here, the statute instead benefits one special class for an essentially unrelated economic redistribution and societal relationship (*see*, *19th St. Assocs. v State of New York*, 79 NY2d 434). Moreover, the employer here is transformed into the *de facto* landlord and receives a benefit directly related to conserving its capital or operating expenditures. As a health care provider, it would otherwise have to recoup those costs by direct expense reimbursement formulas or charges, like others similarly situated, for the true, full cost of medical services rendered in its community. This statute thus diverts and subverts that equal treatment regime. It does not even really protect housing for the subtenant-employees as such, and certainly provides no benefit to the citizenry at large on a fair opportunity and equal access basis. Rather, it bestows a State-enacted indirect gift to a preferred supplicant, the non-occupying prime tenant, underwritten by the improperly burdened property owners. In this respect, Chapter 940 cannot escape the force of *19th St. Assocs. v State of New York* (79 NY2d 434, *supra*), a potent precedent like several others (*see*, *e.g.*,

Seawall, Higgins, Nollan, Agins), not fully appreciated as to their full import and impact in both dissenting expressions.

Part of the underpinning of the Hospital's and State's claim in this case rests on a belated assertion of a health care crisis in the City of New York. The Legislature declared no crisis in enacting this privileged exception. Also, such a generalization would precedentially countenance a myriad of favoritism experiments or supplicant demands or preferential entitlements to special classes of entities over the wider, appropriate and constitutionally authorized and recognized State interests of the general public.

We conclude that the peripheral and generalized State interests offered as justification for the regulatory mandates of Chapter 940 fail to sustain the legislation, as constitutionally required for such State action. They are not closely or legitimately connected to the long-established and recognized goals of the RSL and ETPA, which seek to ameliorate the emergency housing shortage. The regime of this statute, in significant functional respects, contradicts an essential tenet of housing protection, at the root of rent-controlled and rent-stabilized enactments. An overarching goal of the RSL and ETPA is to afford some measure of security to occupants so they do not lose their scarce dwelling space due to unilateral, oppressive activities from more powerful entities in the societal equation, whether they be landlords or employers or both. The insupportable contradiction in this statute is cogently demonstrated by its unabashed transfer to the corporate employer of greater eviction rights over its affiliated and disaffiliated employee subtenants than the owner is allowed to retain.

IV.

Appellants-owners also claim that Chapter 940 results in a regulatory wresting away of their reversionary property interests. Property attributes to any physical object include the rights "to possess, use and dispose" of the asset (*United States v General Motors Corp.*, 323 US 373, 378). It is well

established that even if only a single element of an owner's "bundle of property rights" is extinguished, there has been a regulatory taking (*see, Hodel v Irving*, 481 US 704, 716, *supra*; *see also, Seawall Assocs. v City of New York*, 74 NY2d 92, *supra*). Application of the *Seawall* analysis in that respect to the present case adds further support to our primary analysis and result that an unconstitutional taking occurs here under Chapter 940 (*see, Hodel v Irving*, 481 US 704, *supra*; *Koenig v Jewish Child Care Assn.*, 67 NY2d 955; *Rent Stabilization Assn. v Higgins*, 83 NY2d 156, 176, *supra*)—though we need not decide this issue on a stand-alone basis because we do not consider it dispositive by itself in this case. We respectfully submit that Judge Levine's dissenting opinion also misperceives and mischaracterizes the Majority's analysis and holding in the reversionary interest aspect of this case.

Because Lenox Hill Hospital has enjoyed a corporate existence since 1918, the enactment also confers a tenancy quite different in kind, degree and potential from the human, personal successorships countenanced in *Braschi v Stahl Assocs. Co.* (74 NY2d 201, 214, *supra*) and *Rent Stabilization Assn. v Higgins* (83 NY2d 156, *supra*; *cf., Sullivan v Brevard Assoc.*, 66 NY2d 489, *supra*). These cited successorships were narrowly recognized and permitted precisely because of the analytic-policy underpinning of averting personal evictions of real people. They are consistent with the anti-eviction goals of the ETPA and RSL. This statute is not. Yet, both dissents ignore the critical distinction.

We next turn to *Yee v City of Escondido* (___ US ___, 112 S Ct 1522), which does not compel a different result, despite Judge Levine's extensive reliance. *Yee* was a "physical occupation" takings case, not a regulatory type. More importantly, *Yee* dealt with an entirely different statutory scheme. In *Yee*, a group of mobile home park owners brought an action claiming that a local rent control ordinance, which applied to *all* mobile home parks in the municipality, constituted a *physical taking* because the local ordinance deprived the petitioners of all use and occupancy of their real property. *Yee* is addition-

ally distinguishable because the local law was general, not a targeted, narrow, special interest as with Chapter 940, and there was no allegation or proof submitted by the park owners that the local ordinance placed an inordinate burden on selected individuals which, "in all fairness and justice, should be borne by the public as a whole" (*Penn Cent. Transp. Co. v New York City*, 438 US 104, 123, *supra*). Moreover, although the Supreme Court refused to address the petitioners' regulatory taking claim, citing a Rule 14.1(a) violation, the Court stated that the regulatory claim did "not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property" (*Yee v City of Escondido*, *supra*, at 1532). Thus, *Yee* is more analogous to a constitutional challenge against the legislatively created rent control and rent stabilization as a whole, which we certainly do not have in this case and by no means does our ruling affect or diminish the general validity of those broad, longstanding protections and enactments.

Lenox Hill Hospital also urges that Chapter 940 assures an "economically viable rate of return" on the subject apartments to owners, since the statute provides for a 15% vacancy surcharge if there has been no vacancy rental increase within the prior seven years. The sweep of Chapter 940, however, goes well beyond that tendered balance wheel (*compare*, *Concrete Pipe and Prod. v Const. Laborers Pension Tr.*, ___ US ___, 113 S Ct 2264, 2291). The statute vests renewal rights in an entity of unlimited existence, a notion directly contrary to another goal of the RSL and ETPA—to free up apartments, fairly and appropriately, as soon as practicable (*see*, *Rent Stabilization Assn. v Higgins*, 83 NY2d 156, 176-177, *supra*; *Koenig v Jewish Child Care Assn.*, 67 NY2d 955, 958, *supra*). Lastly in this connection, the Court appears to be unanimous in rejecting Lenox Hill's assertion that plaintiffs are estopped from contesting the constitutionality of Chapter 940.

The sharply focused legal question under the controlling precedential and analytical principles may be reduced simply to whether the legislation is supported by a substantial State interest and close nexus. No amount of extensive and virtually

exclusive exploration of economic recalibration of the test, as an expectation for the future, can change that central controlling feature under reasonably clear precedents and principles. To take State action as with the challenged statute, the State must show a legitimate, substantial State interest that is closely, causally related to the action undertaken. The Constitution forbids State action by fiat, no matter the economic equation. Thus, by exercising the judiciary's constitutional duty to decide this case within appropriate precedential and judicial review templates, this Court concludes that the generalized presumption of constitutionality accorded to statutes cannot substitute for the fundamental defect in Chapter 940, to wit, no substantial advancement of a legitimate State interest and "close causal nexus" required for the challenged regulatory enactment to survive scrutiny (*see, Rent Stabilization Assn. v Higgins*, 83 NY2d 156, 173-174, *supra*).

Accordingly, the order of the Appellate Division should be reversed, with costs, and Chapter 940 of the Laws of 1984 declared unconstitutional and the case should be remitted to Supreme Court, New York County, for such further proceedings as may be necessary and appropriate to resolve rights and remedies among the parties to this litigation affected by the holding of this case.

LEVINE, J. (Dissenting):

I respectfully dissent.

In my view, the majority has mistakenly applied a per se standard to an as-applied, purely regulatory takings claim under the Just Compensation Clause of the Fifth Amendment here. In doing so, the majority disregards plaintiffs' utter failure to show that they suffered any economic loss to their investment in the New York City residential rentals market as a result of the application of Chapter 940 of the Laws of 1984 to their 100-plus units apartment building. This case presents essentially and realistically a takings claim challenge to an economic regulation of a business enterprise and, as such, economic analysis of the impact of the regulation is particu-

larly vital to achieving a just disposition of the case. Chapter 940, which merely restored to New York City non-profit community hospitals the protection of the Rent Stabilization Law of 1969 (RSL) and the Emergency Tenant Protection Act of 1974 (ETPA) they previously enjoyed, is completely consistent with and directly furthers basic purposes of the RSL and the ETPA and this Court should sustain its validity.

I.

Concededly and indeed as characterized by plaintiffs, the instant action is a challenge under the Just Compensation,or "takings" clause of the Fifth Amendment of the United States Constitution to Chapter 940 of the Laws of 1984 *as applied* to their ownership of an apartment building of over 100 units on the Upper East Side of Manhattan, 15 of which are leased to defendant Lenox Hill Hospital. Also, before this Court, plaintiffs have abandoned any claim that the tenant eviction protection restored to Lenox Hill under Chapter 940 constitutes a per se, physical taking, that is, statutory authorization for a physical occupation of their property (*cf., Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419, 426; *Seawall Assocs. v City of New York*, 74 NY2d 92, 102-106). Accordingly, this appeal is limited to an as-applied challenge to an alleged, purely regulatory taking.

In *Penn Central Transp. Co. v New York City* (438 US 104), the Supreme Court articulated the appropriate considerations and method of analysis by courts in reviewing such purely regulatory, as-applied taking challenges. First, the Court emphasized that the Just Compensation Clause, insofar as it extends to a regulatory taking, deals with disproportionate *economic* burdens unfairly imposed on a comparatively few individuals by government regulation, and that there is no simple litmus test to determine whether a given regulation constitutes a taking. "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that *economic injuries* caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons"

(*id.*, at 124 [emphasis supplied]). The Court in *Penn Central* cautioned "that government may execute laws or programs that adversely affect recognized *economic values*" without giving rise to a valid takings claim and that there are other instances where, although "government action caused *economic harm*, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes" (*id.*, at 124-125 [emphasis supplied]).

Thus, the Court in *Penn Central* directed that judicial review of a claimed as-applied regulatory taking entails "ad hoc, factual inquiries" in which notably important factors to be considered are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" (*id.*, at 124).

The Supreme Court in *Penn Central* also rejected a takings clause methodology later described as "conceptual severance"[1], i.e., the stratagem of dividing a unitary property into its various component physical segments or its various integral property interests and finding a taking because of the challenged regulation's impact on one physical segment or an individual property right. " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather on the character of the action and on the nature and extent of the interference with rights *in the parcel as a whole*" (*id.*, at 130-131 [emphasis supplied]).

Supreme Court decisions subsequent to *Penn Central*, including decisions authored by the Justices most sensitive to the property rights of owners in takings clause cases, confirm the continued validity of the *Penn Central* ad hoc analysis in as-applied regulatory taking cases, with its emphasis on iden-

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[1] *See*, Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*" (88 Colum L Rev 1667, 1674-1678 [1988]).

tifying the economic factors involved in the taking. Thus, in *Hodel v Irving* (481 US 704), Justice O'Connor characterized the *Penn Central* approach as a "framework for examining the question whether a regulation of property amounts to a taking requiring just compensation [which] is firmly established and has been regularly and recently reaffirmed" (*id.*, at 713-714). Chief Justice Rehnquist in *Pennell v City of San Jose* (485 US 1), declined to entertain a facial regulatory taking challenge to a rent control ordinance because it was impossible to ascertain the economic impact of the ordinance at that preliminary stage. "Given the 'essentially ad hoc, factual inquir[y]' involved in the takings analysis * * * the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord's rent, without any showing in a particular case as to the *consequences of that injunction in the ultimate determination of the rent,* does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here" (*id.*, at 10 [emphasis supplied]). And in *Lucas v South Carolina Coastal Council* (___ US ___, 112 S Ct 2886), Justice Scalia again affirmed that in the absence of a per se taking "we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and * * * the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally" (*id.*, at ___ n 8, 112 S Ct, at 2895 n 8).

The Supreme Court's emphasis on inquiring for economic loss in an as-applied regulatory takings claim follows directly from the very language of the takings clause itself in the Fifth Amendment, which authorizes all forms of governmental appropriation of private property for a public use, upon the payment of "just compensation" (US Const, Fifth Amend). As one scholar has pointed out, the "normative component" of the takings clause that "has predominated in modern cases" is the "protection of economic value"[2] (Manheim, *Tenant*

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[2] The takings clause also protects dominion interests, but this normative aspect more centrally pertains to per se, physical takings or where the claim is that a governmental condemnation of property violates the

Eviction Protection and the Takings Clause, 1989 Wis L Rev 925, 958). This is why "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken" (*United States v Causby,* 328 US 256, 261, *see also, Keystone Bituminous Coal Assn. v DeBenedictis,* 480 US 470, 516 [Rehnquist, Ch. J., dissenting] ["the question (whether a regulatory taking has occurred) is evaluated from the perspective of the property holder's loss rather than the government's gain"]).

The centrality of determining the extent of economic loss in a regulatory takings challenge was again stressed in *Keystone Bituminous Coal Assn.,* which held "our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property" (*supra,* at 497). And in *Keystone,* the Court also insisted that the comparison is to be based upon the economic loss to the property as a whole (*id.*; *accord, Concrete Pipe and Prods. of California v Construction Laborers Pension Trust for S. California,* 508 US ___, ___, 113 S Ct 2264, 2290).

It follows from the foregoing that plaintiffs' minimum burden in order to establish an as-applied regulatory taking here was to show with a modicum of definiteness that they sustained some significant loss of value in their apartment building *as a whole* because of the application of Chapter 940. Indeed, our own precedents require a takings clause challenger to show with a high degree of definiteness the loss of value to the affected property caused by a regulatory taking (*see, Honore De St. Aubin v Flacke,* 68 NY2d 66, 76-77).

In the instant case, the sole evidence submitted by plaintiffs of any adverse economic impact of Chapter 940 on the value of their apartment building was the averment of one of the plaintiffs that the statutorily required renewals of the Lenox Hill leases prevented plaintiffs from exercising their vacancy rights under the RSL and ETPA, to "renovate and reconfigure the apartments to increase the fair market value and rent roll

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public use clause of the Fifth Amendment (*see, Hawaiian Housing Auth. v Midkiff,* 467 US 229).

of the building". It was not inadvertent that the only economic evidence of plaintiffs was this vague reference to the *possibility* of increasing rents and market value of the building through renovations. They concede that if Lenox Hill and its subtenants are evicted, the apartments will remain fully subject to rent stabilization, and any new tenants and their successor family members would enjoy the full protections of the RSL and ETPA for the indefinite future. Moreover, whatever loss in the fair market value of the building caused by plaintiffs' inability to increase rents through renovations of the 15 apartments leased to Lenox Hill would be offset by the increase in market value attributable to the periodic 15% increases in Lenox Hill's rents guaranteed under Chapter 940.

The other major economic factor mandated for consideration in an as-applied regulatory taking challenge is "the extent to which the regulation has interfered with distinct, investment-backed expectations" (*Penn Central Transp. Co. v New York City,* 438 US 104, 124, *supra*; *see also, e.g., Concrete Pipe and Prods. of California v Construction Laborers Pension Trust for S. California,* 508 US ___, ___, 113 S Ct 2264, 2291, *supra*; *Lucas v South Carolina Coastal Council,* ___ US___, ___ n 8, 112 S Ct 2886, 2895 n 8, *supra*; *Keystone Bituminous Coal Assn. v DeBenedictis,* 480 US 470, 493-495, *supra*). Plaintiffs purchased this apartment building in 1976, some 12 years after Lenox Hill first acquired leases in the building and seven years after the apartments became subject to rent stabilization. Uncontestably, Chapter 940 did not create any greater encumbrances upon the apartments leased to Lenox Hill than existed in 1976 when plaintiffs chose to invest in the New York City residential rentals market by acquiring the property. Thus, plaintiffs have totally failed to sustain their burden of establishing that Chapter 940 interfered with their investment-backed expectations (*see, Concrete Pipe and Prods. of California v Construction Laborers Pension Trust for S. California, supra,* at ___ 113 S Ct, at 2291-2292).

Plaintiffs' failure to show an economic loss as the result of the application of Chapter 940 should be fatal to their chal-

lenge. In *Goldblatt v Town of Hempstead* (369 US 590) the Supreme Court rejected a regulatory taking challenge because "there is no evidence in the present record which even remotely suggests that [enforcement of the regulation] will reduce the value of the lot in question" *(id.,* at 594; *see also, Prune Yard Shopping Center v Evans,* 447 US 74, 84 [Rehnquist, J.] ["[H]ere appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking' "]).

II.

The majority justifies its disregard of plaintiffs' failure to demonstrate any economic loss as a result of the application of Chapter 940 to their apartment building primarily on two grounds. One of those grounds is that, because Lenox Hill is a corporation with "unlimited existence", Chapter 940 permanently deprives plaintiffs of their reversionary interests, and this apparently is viewed as a per se taking. "[E]ven if only a single element of an owner's 'bundle of property rights' is extinguished, there has been a regulatory taking (sl opn p 16). The pertinent Supreme Court decisions hold to the contrary. Plaintiffs voluntarily chose to enter the heavily regulated New York City residential rentals market when they purchased the building in 1976, and they admit that if the Lenox Hill leases are permitted finally to expire, the apartments in question will remain indefinitely in that market. Moreover, despite the application of Chapter 940, plaintiffs still continue to be entitled to regain occupancy of any of the apartments from Lenox Hill by establishing that the apartment is intended for use as a primary residence of an owner or the owner's immediate family (*see,* 9 NYCRR § 2524.4 [a]), or that the owners intend to withdraw the apartment from the rental market (*id.,* at § 2524.5 [a] [1]). Additionally, plaintiffs can terminate any of the Lenox Hill leases and recover possession by showing that Lenox Hill or its subtenants com-

mitted any of the statutorily described wrongful acts authorizing an owner to evict (*see, id.*, at § 2524.3).

The foregoing establishes the virtually identical impairment of reversionary property rights here to that considered by the Supreme Court in *Yee v City of Escondido*, ___ US ___, 112 S Ct 1522). In *Yee*, the combined State and local mobile home park rent control and tenant eviction control laws imposed municipal regulation of rent increases, limited the park owner's right to terminate a mobile homeowner's tenancy to instances of nonpayment of rent and tenant misconduct, or the park owner's intention to use the park site for an entirely different purpose (*see, id.*, at ___, 112 S Ct, at 1526-1527). Moreover, the regulations in *Yee* barred a park owner from disapproving a transfer of ownership of any mobile home in the park or requiring the removal of a mobile home upon its sale. Just as contended here, the taking challengers in *Yee* asserted that under the legislative scheme "the mobile homeowner is effectively a *perpetual tenant* of the park, and the increase in the mobile home's value thus represents the right to occupy a pad at below-market rent indefinitely" (*id.*, at ___, 112 S Ct, at 1528 [emphasis supplied]). Not only did the Supreme Court in *Yee* reject the claimants' contention that the "perpetual tenancy" constituted a per se physical taking, it also ruled that the challenge to the regulation there fell within the class of cases where determining whether a taking had occurred "entails complex factual assessments of the purposes and *economic effects* of government actions" (*id.*, at ___, 112 S Ct, at 1526 [emphasis supplied]).

Attaching such critical significance on the takings question to the claimed permanent suspension of plaintiffs' reversionary rights also is inconsistent with the Supreme Court's rejection of the "conceptual severance" approach to challenges in *Penn Central Transp. Co. v New York City* (438 US 104, *supra*) and *Keystone Bituminous Coal Assn. v DeBenedictis* (480 US 470, *supra*). As stated in *Andrus v Allard* (444 US 51): "[W]here an owner possesses a full 'bundle' of property rights, *the destruction of one 'strand' of the bundle is not*

a taking, because the aggregate must be viewed in its entirety" (*id.*, at 65-66 [emphasis supplied]).

Elevating the reversionary, non-economic dominion interest of plaintiffs here to the status of a fundamental constitutional right on the regulatory takings question is, in my view, particularly inappropriate and unrealistic in the case of New York City real estate entrepreneurs in the residential rentals market, in which individual tenants and individual apartments are both highly fungible. In the New York City housing industry, an owner's genuine reversionary interest is satisfied by the ability to remove a financially or behaviorally irresponsible tenant—rights plaintiffs will continue to enjoy notwithstanding the application of Chapter 940.

Scholars and commentators on the takings clause have repeatedly pointed out that dominion property interests, that is, the right to exclude others or recover possession, may be of significance to an individual homeowner or even perhaps the lessor of a modest multi-family dwelling, but not for the modern urban real estate entrepreneur's leasing of a large apartment building where the values at stake in the landlord's reversionary rights are almost completely economic. Thus, Professor Costonis contrasted the dominion interests identified in William Pitt's famous illustration of English private property rights, that the most impoverished subject's weather-beaten cottage remained impregnable to all the King's forces, with the actual dominion interest of landlords such as plaintiffs.

> But the values comprehended by the dominion interest of Pitts' 'poorest man' in his 'ruined tenement' would seem to be worlds apart from those involved in the dominion interest of a Manhattan landlord, whose apartments are rented for profit to the general public and, when rented, are the subject of their tenants' exclusive possession. (Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Takings Issue*, 58 NYU L Rev 465, 519 [1983]; *see also*, Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis L Rev 925, 1010-1012, *supra*; Radin, *The Liberal Conception of*

Property: Cross Currents in the Jurisprudence of Takings, 88 Colum L Rev 1667, 1693-1695, *supra*; Note, *The Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests*, 100 Harv L Rev 1067, 1081-1084 [1987]).

The majority's principal reason for finding a per se taking here is its conclusion that Chapter 940 fails to substantially advance any legitimate State interest because the legislation was enacted purely to serve the private interests of Lenox Hill. The majority also applies a heightened level of judicial scrutiny to the issue of whether Chapter 940 advances a legitimate State interest, i.e., requiring a close causal nexus between the legislative means and ends. The majority states that Chapter 940 "was sought and designed essentially to subsidize the non-profit hospital's special fringe benefit to some of its special health care employees" (sl opn p 13) and that Chapter 940 cannot be characterized as general welfare legislation because it merely serves as a "preservation of this Manhattan Upper East Side housing enclave for this privileged entity's benefit" (sl opn p 10). The absence of a close causal nexus is explained as follows: "The *central, underlying purpose* of the RSL is to ameliorate the dislocations and risk of widespread lack of suitable dwellings. Chapter 940 does not contribute to that desirable altruistic aim" (sl opn p 12 [emphasis supplied]).

Even under the heightened judicial scrutiny standard applied by the majority, a court is not permitted to pick and choose among the express purposes of legislation in employing the test of whether the requisite connection exists between the particular regulation and the problems the Legislature sought to ameliorate. Nor does strict scrutiny require that a regulation serve *all* of the legitimate State interests the Legislature sought to advance by the statutory scheme.

Undeniably, at least one of the original primary purposes of the rent stabilization laws was "to prevent speculative, unwarranted and abnormal increases in rents" and "to forestall [landlord] profiteering, speculation and other disruptive prac-

tices" (Findings of Declaration and Emergency, Local Law 1969, No 16, Administrative Code of City of NY § 26-501). The tenant eviction protection provisions of the RSL and ETPA not only have the purpose of ameliorating harmful dislocations of tenants (as alluded to in the majority's opinion), but also serve as a necessary element of any effective rent regulation program. As recognized by Justice Holmes in *Block v Hirsh* (256 US 135), the first Supreme Court takings clause review of rent control and tenant eviction protection legislation: "The preference given to the tenant in possession *is an almost necessary incident* of the policy [to prevent excessive rents] and is traditional in English law. *If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail* (*id.*, at 157-158 [emphasis supplied]). The Supreme Court again appreciated the need for tenant eviction protection to have effective rent regulation in construing Federal price control legislation a generation later "The Emergency Price Control Act was intended in part to prevent excessive rents in the public interest, and the *very anti-eviction regulations* under which the Administrator granted the eviction certificate here *were specifically designed to prevent manipulative renting practices which would result in excessive rents*" (*Parker v Fleming*, 329 US 531, 536-537 [emphasis supplied]).

Presumably because corporate primary tenants renting apartments for residential occupancy of officers or staff (such as Lenox Hill has done here) were also subject to the legislatively defined evil of "speculative, unwarranted and abnormal increases in rents", the Legislature in enacting the RSL in 1969 did not exempt corporate tenancies from the rent regulation and tenant eviction protection benefits of that statute. Hospital and other corporate tenants remained eligible for those benefits until the enactment of the Omnibus Housing Act (OHA) of 1983 (L 1983, ch 403) (*see, Koenig v Jewish Child Care Assn. of New York*, 67 NY2d 955; *see also, 520 East 81st Street Assocs. v Lenox Hill Hosp.*, 38 NY2d 525). As Judge Ciparick has cogently pointed out in her dissent the loss of the protections of the RSL and ETPA by non-

profit hospitals was "an unintended consequence of the OHA" (dissent, sl opn p 2). The relevant purpose of the OHA in requiring that the tenant on the primary lease be the occupant of any rent stabilized apartment was to forestall victimization of subtenants by "speculative and profiteering practices" of the primary tenants (dissent, sl opn p 2, [quoting L 1983, ch 403 §1]).

As the Bill Jacket to Chapter 940 demonstrates, the Legislature could readily have considered that the evils addressed by the primary tenant residency requirements of the OHA were totally inapplicable to the non-profit community hospitals' subletting of nearby apartments to nursing staff "with a portion of the rent being subsidized by the Hospital" (Letter from Lenox Hill Hospital dated July 17, 1984, Bill Jacket, L 1984, ch 940, at 24). The Legislature also could readily have determined that non-profit hospitals continued to need the protections of the RSL and ETPA. The very same housing market conditions that impelled the original adoption of rent stabilization—apartment scarcity and artificially inflated rents—created a crisis for the hospitals by jeopardizing their ability to maintain adequate staffing. "The high cost of housing and the shortage of available apartments in Manhattan has created the need for the Hospital to provide adequate and moderately priced housing in order to recruit and retain registered nurses" (Letter from Lenox Hill Hospital dated July 27, 1984, Bill Jacket, L 1984, ch 940, at 27).

Moreover, contrary to the assumption of the majority, the crisis was not unique to Lenox Hill Hospital. Mailgrams from the president, director of nursing and general medical director of Beth Israel Medical Center urging the Governor's approval of Chapter 940 state:

> This legislation is essential to hospitals that rent apartments for use by affiliated health care personnel such as nurses. Failure to sign this legislation will make it impossble (sic) for us to provide safe and affordable housing for staff members. The inability to secure such housing seriously compromises our ability to service our community's health care needs (*id.*, at 35-37).

There is nothing in the record or legislative history to impugn the representation by Lenox Hill that enactment of the provisions of Chapter 940 was "actively sought" by the Association of Hospital Housing Administrators, a group representing 20 nonprofit hospitals in Metropolitan New York (Letter from Lenox Hill Hospital dated July 27, 1984, Bill Jacket, L 1984, ch 940, at 29, *supra*).

The Legislature therefore could have concluded that removing the protections of the RSL and the ETPA from New York City's non-profit hospitals placed the hospitals in the plight of being unable to maintain adequate nursing staff because of the loss of apartment renewals, or negotiating with the landlords (fully aware of the acuteness of the hospitals' housing needs) for renewals at artificially inflated market rental rates. When, thus, considered in its context within the statutory framework of the rent stabilization laws as a whole, and giving a fair and comprehensive reading to Chapter 940's own legislative history to ascertain the ends the Legislature chose to serve in enacting it, surely Chapter 940 substantially advances a legitimate State interest, even under the heightened level of judicial scrutiny applied by the majority requiring a close causal nexus between this land use regulation and "the problems sought to be ameliorated" (*Rent Stabilization Assn. of New York City v Higgins*, 83 NY2d 156, 174).

Essentially, Chapter 940 restored to non-profit community hospitals in New York City the protections of the rent stabilization laws they previously enjoyed, against excessive rent increases and landlord profiteering (caused by artificially inflated rental market conditions), protections apparently unintentionally withdrawn by enactment of the OHA. Reinclusion of New York City non-profit hospitals within the broad class of human tenants and their successor family members subject to rent stabilization directly and undeniably serves the legislative protective and preventive goal with respect to abnormal rental increases and landlord profiteering. Indeed, as I have already shown the legislative history of Chapter 940 easily supports a legislative determination that

non-profit hospitals have special needs to be included within the protective umbrella of the RSL and ETPA.

Moreover, it was entirely reasonable to exempt nonprofit hospital tenancies from the primary tenant residency requirements of the OHA, the purpose of which was to ameliorate an entirely different problem than that addressed by the RSL and ETPA, i.e., primary tenant manipulation and exploitation of the rent stabilization laws in entering into subleases.

Chapter 940 more than satisfies any possibly required heightened level of judicial scrutiny. Its provisions, including the periodic rental increases to which landlords of the hospitals are entitled, are narrowly tailored to minimize if not totally avoid any transfer of wealth from landlords to lessee hospitals (*see, Yee v City of Escondido*, ___ US ___, ___, 112 S Ct 1522, 1529, *supra*) as a result of the economic regulation embodied in Chapter 940. The absence of any evidence in the record of an adverse economic impact upon plaintiffs as a result of the application of Chapter 940 powerfully suggests that the Legislature succeeded in that effort. Certainly plaintiffs have not tendered any less restrictive legislative alternative that would accomplish the protective purposes of Chapter 940.

Nor is it of any significance on the takings issue, as the majority implies, that non-profit community hospitals were singled out among other possibly worthy institutions for the continued benefits of the rent stabilization laws. Surely maintaining the non-profit hospitals' "ability to service [their] community's health care needs" (Beth Israel's Mailgrams, Bill Jacket, L 1984, ch 940, *supra*), without adding to health care costs the excessive landlord profits from abnormal rent increases, merits special legislative concern. In *Rent Stabilization Assn. of New York City v Higgins* (83 NY2d 156, *supra*), we deferred to the expertise of the State Division of Housing and Community Renewal as to "the designation of classes of individuals to whom [the agency] has extended noneviction protection" (*id.*, at 174). The Legislature is entitled to at least the same deference. That the majority may consider Chapter 940 to be "*underinclusive* is, of course, no

justification for rejecting it" (*Keystone Bituminous Coal Assn. v DiBenedictis*, 480 US 470, 487 n 16, *supra*). "[Congress] need not control all rents or none. It can select those areas or those classes of property where the need seems the greatest" (*Woods v Cloyd W. Miller, Co.*, 333 US 138, 145).

For all of the foregoing reasons, I conclude that plaintiffs have failed to satisfy their heavy burden of establishing the unconstitutionality of Chapter 940 as a regulatory taking in its application to them.

III.

I wish to add some additional comments on the appropriate level of judicial scrutiny in regulatory takings challenges. This Court in *Seawall Assocs. v City of New York* (*supra*) read the Supreme Court', decision in *Nollan v California Coastal Commn.* (*supra*) as imposing in regulatory takings cases a heightened level of judicial scrutiny, i.e., requiring a close causal nexus between the legislative means and ends, in applying the primary per se test of whether the challenged regulation substantially advances a legitimate State interest. We unanimously adhered to that interpretation of *Nollan* in rejecting the facial challenge to the regulation in *Rent Stabilization Assocs. v Higgins* (83 NY2d 156) and, as I have already outlined in the main body of this dissent, I am confident that Chapter 940 satisfies the constitutional standard at the "close causal nexus" level of scrutiny.

Subsequent to our decision in *Rent Stabilization Assn. v Higgins* (*supra*), in *Dolan v City of Tigard* (___ US ___, 114 S Ct 2309) the Supreme Court reaffirmed its holding in *Nollan* and further explained the quantum of the close causal nexus required in *Nollan*. In *Dolan*, involving a regulatory taking claim similar in nature to that considered in *Nollan*, the majority held that the required nexus the *municipality had the burden to demonstrate* was " 'rough proportionality' " (*supra*, ___ US, at ___, 114 S Ct, at 2319) between the regulatory exaction from the property owner and the problem it addressed.

Nollan and *Dolan* both involved the imposition by a governmental land use administrative agency at the State or local level of conditions for discretionary approval of building permit applications by landowners, thereby requiring the landowners to dedicate property rights of permanent physical occupation of their land to the general public. In both cases, the Supreme Court held that the exaction of those conditions would have constituted per se physical takings if instead they had been manifested as direct orders for the landowners to cede rights of physical occupation for some general welfare purpose (*see, Nollan, supra*, 483 US, at 831; *Dolan, supra*, ___ US, at ___, 114 S Ct, at 2316).

Prior to *Dolan*, some respected takings clause scholars interpreted *Nollan* as limiting its close causal nexus scrutiny to the regulatory imposition of conditions of permanent physical occupation which would otherwise constitute a per se taking (*see*, Michelman, *Takings 1987*, 88 Colum L Rev 1600, 1608-1609; Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis L Rev 925, 949-950, n 146, 149, *supra*; Tribe, *American Constitutional Law*, § 9-4, at 599 n 20 [2d ed]).

My reading of *Dolan* leads me now to agree. First, clearly and expressly, *Dolan* limits its imposition of the burden on the regulator to demonstrate rough proportionality in the " 'essential nexus' " (majority sl opn p 9) to cases involving administrative agency impositions of suspect conditions of physical occupation. Chief Justice Rehnquist's majority opinion in *Dolan* states:

> Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. (*see, e.g. Euclid v Ambler Realty Co.*, 272 US 365 [1926]). Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation the

burden properly rests on the city (*Dolan, supra,* ___ US, at ___ n 8, 114 S Ct, at 2320 n 8).

Second, in *Dolan* Chief Justice Rehnquist contrasted the typical "land use regulation [which] does not effect taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' *Agins v Tiburon,* 447 US 255", with the regulatory action at issue in *Dolan,* where "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel [and] the conditions imposed were not simply a limitation on the use petitioner might make of her parcel, but a requirement that she deed portions of the property to the city" (*supra,* ___ US, at ___, 114 S Ct, at 2316).

Finally in *Dolan,* the majority decision justified the application of heightened scrutiny by referring to *Nollan's* adaptation of the "well-settled doctrine of 'unconstitutional conditions,' [under which] the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit" (*id.,* at ___, 114 S Ct, at 2317). The *Dolan* majority also invoked the conclusion in *Nollan* that without a close connection between the relevant governmental purpose and the required conditional dedication of property, the exaction of a land occupation dedication as a condition for a discretionary permit approval comes down to nothing more than "gimmickry" to obtain an appropriation of property by " 'extortion' " without paying for it (*id.,* at ___, 114 S Ct, at 2317).

Since neither the doctrine of unconstitutional conditions nor the metaphor of municipal extortion masquerading as conditional land development permit approval has ever been invoked to determine the validity of rules merely regulating the *use* of property, I conclude that the *Nollan* and *Dolan* heightened close causal nexus judicial scrutiny is really a judicial response to the special dangers in development permit cases of abuse of the regulatory process to achieve a physical taking of an applicant's property without just compensation.

Thus, in my view, heightened, close causal nexus scrutiny should not be applied to test the validity of all regulatory taking challenges, and should not have been applied in the instant case, although I am convinced that Chapter 940 of the Laws of 1984 can withstand that level of scrutiny. Until either the Supreme Court speaks definitively on whether its rule in *Nollan* and *Dolan* applies generally to all regulatory takings challenges, or this Court chooses to reappraise its reading of *Nollan* as so applying generally to all regulatory taking challenges, I am constrained by stare decisis to apply that level of scrutiny here, and have done so, concluding nonetheless that Chapter 940 thus scrutinized is valid.

CIPARICK, J. (dissenting):

Since 1969, the New York City Council has embraced rent stabilization, "second generation rent control[1]," to ameliorate the "serious public emergency" caused by an acute rental housing shortage within New York City (Admin Code § 26-501). The Rent Stabilization Law (RSL) (Admin Code § 26-501 et. seq.) has consistently been repromulgated, most recently as of March 30, 1994, based on the legislative finding that this "serious public emergency" persists (Admin Code § 26-502 [Loc L 1994, No 4 § 6]). Yet, rent stabilization is not intended to be a permanent, pervasive fixture in the rental housing market. To this end, amendments to the RSL have been adopted to address perceived changes in the urban rental housing market and to remedy abuses.

The enactment of the Emergency Tenant Protection Act (EPTA) in 1974 (L 1974, ch 576) and the Omnibus Housing Act Of 1983 (OHA) [L 1983, ch 403] were directed at

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[1] The Rent Stabilization Law was adopted in 1969 as a "compromise solution" to runaway rent increases affecting some 400,000 post-1947 units previously unregulated and to allay builders' fears that rent control would be extended to new construction (*see*, *8200 Realty Corp. v Lindsay*, 27 NY2d 124, 136-137; *Sullivan v Brevard Assocs*, 66 NY2d 489-494).

restricting the tenant's right to sublet the stabilized unit. The OHA amended the RSL (Admin Code §§ 26-504[a][1][f] and 26-511[c] [12]) to, *inter alia*, exempt units not occupied by the tenant of record as a primary residence from the protections of the RSL. The OHA was adopted in response to "speculative and profiteering practices" by tenants who capitalized on their rent stabilized leases by subletting for a profit or warehousing units in the hope of conversion to individual ownership. In accord with the salutary purposes of the RSL, itself an emergency response to the public housing crisis engendered by disruptive rental practices, including landlords' manipulation of rents and the supply of modestly priced housing, the OHA is designed to protect "public health, safety and welfare" by regulating the conditions of rental occupancy to "prevent uncertainty, potential hardship and dislocation of tenants" (L 1983, ch 403 § 1).

Chapter 940 of the Laws of 1984 was enacted to remedy an unintended consequence of the OHA. Because landlords no longer had to offer renewal leases to tenants who did not use their stabilized units as their primary residence, the authorized subtenants of not-for-profit hospitals were not entitled to renewal leases, subjecting them to eviction. By amending the RSL to create an exception to the primary residence requirement for not-for-profit hospitals that sublease units to their employees, the Legislature recognized that subtenancies created by not-for-profit hospitals were not susceptible to the vices the OHA intended to regulate and that the tenancies of not-for-profit hospitals are consistent with the purposes of the RSL and the ETPA. Indeed, the Division of Housing and Community Renewal (DHCR), the state agency charged with administering the RSL, recommended that the Governor approve Chapter 940 (*see*, Letter of Division of Housing and Community Renewal Commissioner Yvonne Scruggs-Leftwich, Bill Jacket L 1984, ch 940, at 14-15).

The majority declares Chapter 940 unconstitutional, finding no causal nexus between Chapter 940 and the RSL. I respectfully dissent and would declare Chapter 940 constitutional. The close causal nexus between Chapter 940 and the

RSL is that Chapter 940 implements a means of addressing the serious public emergency of housing people in New York City by continuing the protections of the RSL for particular tenancies already subject to rent stabilization. In this regard, Chapter 940 does not suffer from any constitutional infirmity.

I.

Defendant-respondent Lenox Hill Hospital (Lenox Hill) has maintained rental apartments at 420 East 79th Street, New York City, approximately two blocks from its facility, to house affiliated employees since 1964. Lenox Hill instituted a housing program in the 1960's in order to provide convenient, safe and affordable housing for affiliated employees, such as nurses, who work shifts that can begin or end at midnight. Typically, Lenox Hill would execute leases for a number of apartments as the tenant and then sublease an apartment to its employee, who would then assume subtenancy as an incidence of employment. Lenox Hill required the employee to occupy the apartment as a primary residence. Prior to passage of Chapter 940 in 1984, Lenox Hill leased approximately 210 units in close proximity to its facility for occupancy by staff members.

In 1976, plaintiffs purchased 420 East 79th Street, at which time Lenox Hill rented 18 of the 112 units. Lenox Hill is presently the tenant of record for 15 apartments, all of which are subject to the RSL. Until 1991, plaintiffs regularly extended two year renewal leases to Lenox Hill. Prior to the December 31, 1991 expiration of six of the leases, plaintiffs served Lenox Hill and the subtenants of those units with notices of nonrenewal, informing them that the leases would not be renewed because Chapter 940 of the Laws of 1984 is unconstitutional and unenforceable as it purports to grant the subtenants the right to renewal leases and/or continued occupancy, and that Lenox Hill does not occupy the subject apartments as a primary residence as required by the RSL (9 NYCRR §§ 2524.2 and 2524.4[c]). This action ensued.

The legislative history of Chapter 940 demonstrates that it was designed to reinstate the pre-OHA statutory criteria and enable not-for-profit hospitals, such as Lenox Hill, to continue established housing programs. To this end, the senate sponsor cited Lenox Hill strictly as "an example" of a not-for-profit hospital within the measure's purview (*see*, Senate Debates, S. Bill No. 9983, June 28, 1984).

Against this background, two factors are noteworthy. First, any buildings owned or operated on a not-for-profit basis by a hospital or other eleemosynary institution are exempt from regulation under the RSL (Admin Code § 26-511[c]) and the ETPA (McKinney's Unconsolidated Laws of NY § 8625[a][6]). Second, the Legislature recently narrowed the range of leases subject to rent stabilization by decontrolling units that rent at $2,000 per month and whose occupants' federal adjusted gross income exceeds $250,000 for two consecutive calendar years. While these factors may mark steps in the "transition from regulation to a normal market of free bargaining between landlord and tenant" (Admin Code § 26-401[a]), this course, if it continues, must be paved by the Legislature.

While rent stabilization conceptually represents an attempt to equalize the tenant's bargaining power in a scarce housing market by regulating the rental terms,[2] the practical result of rent stabilization is to redistribute the landlord's interest (*see*, Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brooklyn L Rev 741[1988]; Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control*? 21 Sw U L Rev 1019[1992]). Politically, this market redistribution is accepted in the form of rent stabilization as a legitimate exercise of the State's police power in response to rental housing

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[2] It has been suggested that the function of rent stabilization is to eliminate sharp, short-term rent fluctuations while the housing market responds to a shortage over time, not to hold rents at below market levels indefinitely, and calibrated, periodic increases provide owners incentive to increase the housing supply while avoiding dramatic swings in rents (*see*, Cirace, *Housing Market Instability and Rent Stabilization*, 54 Brooklyn L Rev 1275, 1278-1279).

crises, historically a vestige of World War II and, most recently, the consequence of market imbalances that create mass dislocations and shortages of affordable housing (*see*, Manheim, *Tenant Eviction Protection and the Taking clause*, 1989 Wis L Rev 925; *see also Braschi v Stahl Assocs. Co*, 74 NY2d 201, 208, *Block v Hirsch*, 256 US 135, 156).

Whether the rubric of rent stabilization is the appropriate means to address this end is a policy issue not appropriate for judicial resolution (*see*, *Eisen v Eastman*, 421 F2d 560, 567 *cert denied* 400 US 841; *Lincoln Buildup Assocs v Barr*, 1 NY2d 413, 415 *app dismissed* 355 US 12). It is not for this Court to question the reasonableness, propriety, wisdom or expediency of the legislative declaration that a housing emergency continues in New York City or to dismantle rent regulation on a piecemeal basis by judicial fiat where, as here, the statutory amendment is not only in harmony with the intent of the RSL and ETPA but substantially advances the State's interest in militating the relentless rental crisis in New York City (*see*, *Federal Home Loan Mortgage Corp. v New York State Div. of Housing and Community Renewal*, 854 F Supp 151; *Rent Stabilization Assn. of New York City Inc. v Higgins*, 83 NY2d 156, 174, *cert denied* ___ US ___, 114 S Ct 2693).

II.

The Supreme Court has "consistently affirmed that states have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails" (*Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419, 440; *see also*, *Pennell v San Jose*, 485 US 1, 12 n 6; *Bowles v Willingham*, 321 US 503, 517-518; *Loab Estates, Inc. v Druhe*, 300 NY 176, 179). Similarly, the Supreme Court has upheld the authority of state and local governments to engage in land use planning against constitutional challenge, recognizing that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change

in the general law" (*Dolan v City of Tigard*, ___ US ___, 114 S Ct 2309, 2316, quoting *Pennsylvania Coal Co. v Mahon*, 260 US 393, 413). Nevertheless, a governmental regulation cannot trespass the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation. This guarantee was designed to bar government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong v United States*, 364 US 40, 99 [applicable to states via Fourteenth Amendment]; *see, Chicago Burlington & Quincy R.R., Co. v Chicago*, 166 US 226).

A claim that a governmental act infringed upon an owner's Fifth Amendment rights is traditionally evaluated on an *ad hoc* factual basis (Penn Cent. Transp. Co. v New York City, 438 US 104, 124 *reh denied* 439 US 883). The economic impact of a governmental act upon an owner and the extent of interference with an owner's investment-backed expectations are relevant considerations in this evaluation which, as majority states, partakes of no precise formulation (Majority Opn. at 7, citing *Dolan v City of Tigard* 114 S Ct at 3319). It is the opinion of this dissenter, as distinct from the analysis proffered by my dissenting colleague, that the application of these factors should not be parlayed into a discrete takings analysis.

As takings jurisprudence has evolved, the Supreme Court has identified certain intrusions as compensable "without case specific inquiry into the public interest advanced in support of the restraint" (*Lucas v South Carolina Coastal Council*, ___ US ___, 112 S Ct 2886, 2893). Regulations that compel a landowner to endure a physical invasion (*Yee v City of Escondido*, 503 US ___, 112 S Ct 1522, 1528), and regulations that deprive a landowner of all productive or economically beneficial use of the land (*Nollan v California Coastal Commn.*, 483 US 825, 834) constitute these types of compensable takings. However, a governmental regulation will not be found to effect a taking if it "substantially advance[s] legitimate state interests" or does not "den[y] an owner eco-

nomically viable use of his land" (*Agins v Tiburon,* 447 US 255, 260; *Dolan v City of Tigard,* 114 S Ct, at 2316-2317, *supra*; *Seawall v City of New York,* 74 NY2d 92, 107 *cert denied* 493 US 976; *Rent Stabilization Assn.,* 83 NY2d, at 171 and 173, *supra*). A regulation that substantially advances a state interest is constitutionally sound when there is an "essential nexus" between the state interest and the end result of the regulation (*Seawall, supra,* 74 NY2d, at 107). In its recent plurality opinion in *Dolan v City of Tigard,* 114 S Ct 2309, *supra,* the Supreme Court deliberated over the level of scrutiny that governmental motivations and findings should be subjected to when assessing whether such objectives are constitutionally sufficient to justify the regulation. The five justice majority settled on a heightened level of judicial scrutiny, identifying the measure of the nexus requirement as one of "rough proportionality" (*Dolan v City of Tigard, supra,* 114 S Ct, at 2319-2320).

In concluding that Chapter 940 does not advance the overall purposes of the RSL, but rather masquerades as general welfare legislation that preserves an exclusive housing enclave for Lenox Hill, the majority impinges upon the State's prerogative to proportionally extend the scope of the RSL consistent with its declaration of emergency, and its underlying goals which are legitimate state interests deserving protection.

III.

Chapter 940 does not affect a regulatory taking and is constitutionally sound because it substantially advances the State's interest in curbing chronic rental housing shortages.

In countenancing plaintiffs' argument that they are unduly burdened by Chapter 940, and characterizing Chapter 940 as an unconstitutional taking, the majority overlooks the fact that the entire scheme of rent stabilization saddles owners of rental buildings with greater burdens than their unregulated counterparts in furtherance of the public health, safety and welfare, and excuses plaintiffs from a contractual obligation

at the expense of tenants identified as deserving of statutory protection.

By its express terms, the RSL was promulgated "to prevent speculative, unwarranted and abnormal increases of rents . . . which creates a special hardship to persons . . . occupying rental housing" (Admin Code § 26-501). The essential goal of the RSL is to protect and preserve certain designated tenancies from the vagaries of the marketplace. As Chapter 940 is not limited to Lenox Hill but extends to all not-for-profit hospitals, it is anomalous to single out Chapter 940 as "special interest legislation" since by its very nature rent stabilization bestows preferences on designated tenancies (*see, Hotel Dorset Co. v Trust for Cultural Resources of the City of New York,* 46 NY2d 358, 367 & 368 n 3; *see also,* Letter of Hospital Assn of New York State to Governor's Counsel, Bill Jacket L. 1984, ch 940, at 21 [recommending enactment of ch. 940]; Mailgrams from Beth Israel Hospital to Governor, Bill Jacket L. 1984, ch 940, at 35-37 [requesting enactment of ch 940 as essential to hospitals]; *cf, 19th Street Assocs. v State of New York,* 79 NY2d 434).

It is a recognized policy of DHCR to require landlord-owners to offer renewal leases to corporate tenants that lease stabilized apartments for their affiliated officers, directors or employees provided the actual occupant satisfies the primary residence requirement (*see, Matter of Cale Dev. Co., Inc. v Conciliation and Appeals Bd.,* 94 AD2d 229, 232 *aff'd* 61 NY2d 926; *Matter of Sommer v Conciliation and Appeals Bd.,* 115 Misc 2d 820 *aff'd* 93 AD2d 481 *aff'd* 61 NY2d 973; *Matter of Sommer v Conciliation and Appeals Bd.,* 116 AD2d at 459, *supra*; *see also, Koenig v Jewish Child Care Assn.,* 67 NY2d 955, 957). Consistent with this policy, DHCR supported enactment of Chapter 940 as it constituted codification of existent administrative policy (*see,* Letter of DHCR Commissioner Scruggs-Leftwich, Bill Jacket, L 1984, ch 940, *supra*), and ensured that currently protected tenancies would so remain.

Plaintiffs suffered no diminution of rights as a consequence. Chapter 940 in no way impairs the owners' rights to

collect periodic rent increases (*see*, 9 NYCRR § 2522.5); evict unsatisfactory subtenants (*see*, 9 NYCRR § 2524.2); or, completely alter the use of the premise (*see*, 9 NYCRR § 2524.3; compare *Seawall*, 74 NY2d at 108, *supra*).

It is precisely because the units now rented by Lenox Hill have been and will continue to be subject to the RSL that Chapter 940 is causally related to the goals of the statute it amended. As Supreme Court found and the Appellate Division upheld "[t]here is no question but that the apartments are in fact rented to hospital employees [and] it is ultimately residential tenants who are being protected" (*Manocherian, et. al. v Lenox Hill Hospital*, 154 Misc 2d 982, 991 *aff'd* 196 AD2d 726. It was plaintiffs who accepted Lenox Hill as the tenant and consequently cloaked Lenox Hill with protection against the acute rental housing shortage through their participation in recent stabilization. Chapter 940 ensures Lenox Hill will continue to receive those benefits of the RSL it currently extends to its employee-subtenants, who then escape the perils of the rental market as an incidence of employment (*see, Sommer v New York Conciliation and Appeals Bd.*, 116 AD2d 457, 459).

The majority's assault on Chapter 940's scope is further minimized in light of the blanket exception from the provisions of the RSL and ETPA for housing accommodations owned or operated by non-profit eleemosynary institutions (Admin Code § 26-511[c]; McKinney's Unconsolidated Laws of NY § 8625[a][6]; *cf.* § 8625[a][11]). That the ability of these institutions to provide adequate, affordable housing to their affiliates remains unimpaired despite the broad sweep of the RSL and ETPA is indicative of the State's interest in protecting and preserving dwellings used to house affiliates of such institutions. The Lenox Hill employees, as subtenants, are entitled to the protections of the RSL and thus should not be penalized as a result of Lenox Hill's inability or unwillingness to serve as a prime landlord or owner engaged in real estate development. A legitimate goal of rate regulation, such as rent stabilization, is the protection of the "consumer's"

welfare (*see, Pennell v City of San Jose,* 485 US at 12, *supra*).

Therefore, it cannot be said, as a matter of law, that the goals of the RSL "to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare" are not promoted when the effect of Chapter 940 is to permit an urban not-for-profit hospital to offer its health care workers convenient, safe and affordable housing that otherwise would not be available (*see, 19th St. Assoc v State of New York,* 79 NY2d 434, 443). It is the declaration of unconstitutionality by the majority that will yield a result contrary to the RSL.

In wresting the subject rent stabilized apartments from Lenox Hill, the majority will cause the eviction of tenants from already protected dwelling space, who did nothing other than occupy their units as primary residences. By characterizing Chapter 940 as a statute that diverts and subverts the equal treatment regime, the majority not only ignores the realities of rent stabilization in the urban center, but tips the balance in favor of the party that already has unequal bargaining power. This is exactly the oppressive behavior the RSL, as amended by Chapter 940, seeks to forestall.

That the subtenant's occupancy is contingent on employment by Lenox Hill does not contravene the intent of the RSL, contrary to the majority's contention, as Lenox Hill's motive for maintaining the rent stabilized units is to house its affiliated employees, not the general population. Obviously, an employee on the verge of retirement or otherwise poised to sever the employment relationship has notice of the requirement that occupancy is contingent upon employment by Lenox Hill as to allow for appropriate relocation plans. In any circumstance, the subtenant would receive a standard termination notice and be afforded all substantive and procedural due process rights as required by law, including a summary proceeding in Civil Court (*see,* 9 NYCRR §§ 2524.2 and 2524.3).

IV.

As this Court has recognized, rent regulation creates tenancies of indefinite duration (*see, Rent Stabilization Assn,* 83 NY2d, at 172-173, *supra*). It is, therefore, of no consequence whether the tenant is an individual with a finite life span or a corporation endowed with a perpetual existence, because the same result obtains (*see, Seawall,* 74 NY2d, at 112, *supra*; *Nollan,* 483 US, at 837, *supra*). Plaintiffs, who bear the heavy burden of demonstrating that the subject enactment is unconstitutional, fail to establish by any empirical proof that the rental rates of the Lenox Hill units are any less than those of comparable units in the building as to deprive them of the economically beneficial use of their property. Indeed, plaintiffs have and will continue to voluntarily collect rents from the Lenox Hill subtenants, as well as increases "by a sum equal to 15 percent of the previous lease rental" whenever Lenox Hill executes a renewal lease, provided plaintiffs have not received any vacancy increases or surcharges in the seven years prior to the new renewal lease.

Any objection plaintiffs harbor regarding the sufficiency of the 15 percent vacancy figure is more appropriately addressed in a hardship petition before DHCR. There is no merit to Lenox Hill's claim that plaintiffs are estopped from any such challenge to Chapter 940.

I would reject plaintiffs' assertion, credited by the majority, that plaintiffs have forfeited their reversionary interests in the subject units. This contention rings hollow when confronted with the fact that the use plaintiffs intended for the property has remained constant and plaintiffs have enjoyed the security of a tenant that always pays the rent (*see, Bowles v Willingham,* 321 US, at 517-518, *supra*; *Penn Central Transp. Co. v New York City,* 438 US, at 136, *supra*; *Rector, Wardens and Members of the Vestry of St. Bartholomew's Church v City of New York,* 914 F 2d 348, 356). "It is the forced occupation . . . not the identities of the new tenants or terms of the leases, which deprives the owners of their possessory interests and results in . . . takings" (*Seawall,* 74

NY2d, at 106, *supra*; *see also, Heart of Atlanta Motel, Inc. v United States*, 379 US 242, 261). In this regard, plaintiffs' "investment backed expectations" have been and will continue to be realized as there is no evidence that plaintiffs intend to sell or otherwise change the use of the subject apartments.

Plaintiffs have failed to demonstration that Chapter 940 effects a regulatory taking. Because Chapter 940 substantially advances legitimate state interests and does not deprive plaintiffs of any economically beneficial use of their property, I conclude Chapter 940 withstands constitutional scrutiny.

Accordingly, I would affirm the order of the Appellate Division.

* * * * * * * * * * *

Order reversed, with costs, Chapter 940 of the Laws of 1984 declared unconstitutional and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein. Opinion by Judge Bellacosa. Judges Simons, Titone, Mangano and Crew concur. Judges Levine and Ciparick dissent and vote to affirm in separate dissenting opinions. Chief Judge Kaye and Judge Smith took no part.

Decided October 20, 1994

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Judith S. Kaye, Chief Judge, Presiding

1 No. 135

AMIR MANOCHERIAN, et al.,

Appellants,

—v.—

LENOX HILL HOSPITAL, &c., et al.,

Respondents,
et al.,
Defendants.

The appellants in the above entitled appeal appeared by Rosenberg & Estis, P.C.;
the respondents appeared by Edmond F. Wolk, Esq. and Proskauer Rose Goetz & Mendelsohn; Hon. G. Oliver Koppell, Attorney General of the State of New York appeared; and *amici curiae* appeared by Klein & Keenan, Esqs. and Ronald A. Zumbrun, Esq.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, Chapter 940 of the Laws of 1984 declared unconstitutional and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein. Opinion by Judge Bellacosa. Judges Simons, Titone, Mangano and Crew concur. Judges Levine and Ciparick dissent and vote to affirm in separate dissenting opinions. Chief Judge Kaye and Judge Smith took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

_____

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, October 20, 1994

Sullivan, J.P., Ellerin, Kupferman, Ross, Asch, JJ.

49406 AMIR MANOCHERIAN, et al.,

Plaintiffs-Appellants,

—against—

LENOX HILL HOSPITAL, etc., et al.,

Defendants-Respondents,

—and—

T. O'CONNOR, et al.,

Defendants.

Order and judgment (one paper), Supreme Court, New York County (Myriam Altman, J.), entered January 8, 1993, affirmed for the reasons stated by Altman, J., without costs and disbursements. All concur except Sullivan, J.P. and Ross, J. who dissent in a memorandum by Sullivan, J.P., as follows:

SULLIVAN, J.P. (dissenting)

In this declaratory judgment action to determine, *inter alia*, whether Lenox Hill Hospital is entitled to renewal leases to six rent stabilized apartments at 420 E. 79th Street in New York City, the IAS court and, in affirming, the majority, interpret chapter 940 of the Laws of 1984 so that renewal leases to the six apartments in question, as well as 48 others similarly affected, must be offered to Lenox Hill effectively in perpetuity.

At issue is the proper interpretation of chapter 940, an amendment to the Rent Stabilization Law and the Emergency Tenant Protection Act applicable only to a not-for-profit hospital, such as Lenox Hill, which leases, and, in turn, subleases, rent stabilized apartments for the use of "affiliated" subtenants. Chapter 940 provides that stabilization coverage

will continue as long as the subtenant of the apartment is a primary resident. In all other instances of rent stabilization, it is the prime tenant who must reside in the apartment to maintain stabilization protection. Thus, since chapter 940 provides an exception for non-profit hospitals in determining primary residence, Lenox Hill, a corporation which could never be a primary resident of a rent stabilized apartment, is ensured of a continued supply of rent stabilized apartments.

Plaintiffs (the owner) acquired the building in question on April 1, 1976, subject to a lease between Lenox Hill and their owner predecessor entered into during the 1960's, prior to the enactment of the Rent Stabilization Law, effective as to these apartments on May 6, 1969, with respect to 18 apartments. The owner asserts that any interpretation of chapter 940 that permits Lenox Hill, an entity with an interminable corporate existence, to lease these apartments in perpetuity results in a regulatory taking since it is permanently deprived of its reversionary interest in the property, i.e., the expectancy that it will one day recover possession of the apartments to dispose of as it sees fit, and since no legitimate state interest is served by allowing the hospital to circumvent the Rent Stabilization Law by using the apartments in question as transient dormitory space for an ever changing succession of nurses.

A brief history of chapter 940 is in order to put the facts and procedural background of this case in proper perspective. Laws of 1971, chapter 373, amended the State Enabling Act for rent control and rent stabilization (L 1962, ch 21, also known as the Local Emergency Housing Rent Control Act) to exempt from regulation all housing accommodations "not occupied by the tenant in possession as his primary residence." The same langugage was used in section 5(a)(11) of the Emergency Tenant Protection Act of 1974 (L.1974; ch. 576, §4 [ETPA]), which exempted newly stabilized units. The phrase "tenant in possession" was considered as encompassing a subtenant. Thus, the non-primary residence exemption was inapplicable if a subtenant in possession used the apartment as his primary residence.

Laws of 1983, chapter 403, § 41 (also known as the Omnibus Housing Act [OHA]) amended Administrative Code § YY51-3.0 (renumbered § 26-504[a][1][f]) to exempt from the Rent Stabilization Law dwelling units "not occupied by the tenant, not including subtenants or occupants, as his primary residence, as determined by a court of competent jurisdiction." Thus, for purposes of the non-primary residence exemption, the named tenant himself had to occupy the apartment as a primary residence. No longer could he qualify for the benefits of rent stabilization, including the offer of a renewal lease, merely because a subtenant used the apartment as his primary residence.

OHA's restrictions on primary residence and subletting had an obvious adverse effect on Lenox Hill, which, for several years, had been subleasing rent stabilized apartments as dormitory space for its nurses. Lobbying the Legislature for relief so that safe, convenient and affordable housing would be available for its staff who are required to work evening shifts, Lenox Hill played a key role in introducing chapter 940 (*see, 520 E. 81st St. Assocs. v. Lenox Hill Hosp.*, 142 Misc 2d 723, 725, *revd* 157 AD2d 138, *revd on other grounds* 77 NY2d 944 [*Lenox Hill I*]).

Section I of chapter 940 amended the non-primary residence section of the Rent Stabilization Law, section YY51-3.0(f) of the Administrative Code (renumbered § 26-504[a][1][f]), to add, "[W]here a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants." Section 3 of chapter 940 amended section 5(a)(11) of the ETPA to add the same language. Thus, by virtue of chapter 940, subtenants of not-for-profit hospitals, which, pursuant to the OHA, could not be considered as "tenants" for the purposes of the non-primary residence exemption, were deemed tenants for determining primary residence.

Sections 2 and 4 of chapter 940 further amended the Rent Stabilization Law and the ETPA to give a not-for-profit hospital the right to sublet its apartments to affiliated employees

without first obtaining the owner's consent. In addition, unlike other tenants, who have the right to sublet for only two out of every four years, the duration of the not-for-profit hospital's subletting was completely unrestricted.

Of the six leases at issue, five were rented to Lenox Hill pursuant to leases dated July 5, 1973 and most recently renewed for two-year periods expiring August 30, 1991. These leases say nothing about Lenox Hill's right to sublet to affiliated employees; they provide that the apartment "shall be occupied only by Tenant [Lenox Hill] and the members of the immediate family of Tenant." According to the leases, subletting is permitted only with the prior written consent of the landlord. The most recent rent stabilized renewal lease for the sixth apartment expired on December 31, 1991. Pursuant to its housing program, Lenox Hill used all of the apartments for members of its nursing staff.

After service of the appropriate "window period" notice, the owner commenced two actions, now consolidated pursuant to stipulation, against Lenox Hill, the State of New York and the affected subtenants, one with respect to five of the leases at issue and the other with respect to the sixth, for a declaration, *inter alia*, that Lenox Hill was not entitled to a renewal lease. After joinder of issue by Lenox Hill, the State, by stipulation, remaining a nominal defendant solely to defend the constitutionality of chapter 940 and the subtenants neither appearing or answering, the owner moved for summary judgment. Lenox Hill and the State thereafter cross-moved for summary judgment.

The IAS court granted summary judgment to Lenox Hill and the State, finding that chapter 940 was not constitutionally infirm to the extent that it required the owner to offer leases in perpetuity to Lenox Hill. Insofar as is relevant to this appeal the IAS court rejected the owner's regulatory taking claim, finding that chapter 940 satisfied the first of the Supreme Court's two-prong test for determining whether a regulatory taking has occurred in that, in curbing oppressive conduct and profiteering by landlords, thus providing protection to Lenox Hill and its employees and promoting the

"health and welfare" of the general public by permitting non-profit hospitals to obtain for their medical personnel housing which might not otherwise be available, it substantially advanced a legitimate state interest. The court rejected the argument that Lenox Hill had a perpetual corporate existence and that an interpretation of chapter 940 which compelled the offer of a renewal lease to Lenox Hill extinguished the owner's reversionary interest in its property, finding that the Rent Stabilization Law "allows continuing occupancy by primary resident tenants and their family members under circumstances which might very well be perpetual." Thus, the court found that the owner had failed to show that it had been deprived of its reversionary interest in the apartments any more so than if it had rented to individual tenants. Since, in my view, the IAS court's premises in its regulatory taking analysis do not withstand scrutiny and chapter 940 fails both aspects of the two-pronged test for determining whether the constitutional guarantee against an uncompensated taking has been violated, I would reverse.

In *Seawall Assocs. v. City of New York* (74 NY2d 92, 107, *cert denied*, 493 US 976), the Court of Appeals summarized the two-pronged test for determining whether a regulatory taking has occurred. "[T]he constitutional guarantee against uncompensated takings is violated when the adjustment of rights for the public good becomes so disproportionate that it can be said that the governmental action is 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' (*Armstrong v. United States* [*supra*, 364 US at 49]). * * * It is basic * * * that * * * a burden-shifting regulation of the use of private property will, without more, constitute a taking: (1) if it denies an owner economically viable use of his property, *or* (2) if it does not substantially advance legitimate State interests (citations omitted). Either would be sufficient to invalidate a property-use regulation. (Emphasis in original.) (*See also, Nollan v. California Coastal Commn*, 483 US 825, 834; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 US 470, 485, 495; *Agins v. Tiburon*, 447 US 255, 260.)

With respect to the "legitimate state interest" aspect of the two-pronged test, it is important to note that chapter 940 applies only to apartments sublet to the affiliated employees of a not-for-profit hospital. Thus, should the subtenant, whether through retirement or a change of job, cease his or her employment with Lenox Hill, the lease tenant, he or she must voluntarily vacate or be evicted. In *Lenox Hill I* (157 AD2d 138, *supra*), which involved the same issue, this court noted with respect to the subtenants of the 39 apartments at issue that their employment at Lenox Hill was rather transitory, and that during the term of the last renewal leases there was a turnover in one-third of the apartments *(id.*, at 144). If, as the IAS court has held, chapter 940 requires the owner to offer renewal leases to Lenox Hill, whose employees, when they lose or leave their jobs, also lose their right to occupy the apartments, irrespective of how long they have lived there, then the very purpose of the Rent Stabilization Law, which was enacted to alleviate a severe housing shortage (*see*, Administrative Code § 26-501; McKinney's Uncons Laws of NY § 8622 [ETPA § 2]), is being contravened. A statutory interpretation which encourages the deployment of rent stabilized apartments in perpetuity as temporary dormitory space for an ever changing roster of hospital employees and promotes the displacement of these employees, some of whom may be long-term tenants, when they leave their employment does a disservice to rent stabilization's underlying purpose of protecting residential tenants from evictions during an acute housing shortage. (*See, Sterling v. Lapidus*, 10 AD2d 180, 185; *Suppus v. Bradley*, 278 App Div 337, 338-339.) Rather than serve the concept of tenant protection, such an interpretation would encourage the eviction of tenants in occupancy in favor of a corporate tenant, whose occupancy is, at best, constructive. It was never the purpose of rent regulation to protect corporations, but rather individuals. (*Matter of Schwartz Landes Assocs. v. New York City Conciliation & Appeals Bd.*, 117 AD2d 74, 81.)

Lenox Hill attempts to justify the IAS court's interpretation by arguing that, given the severe nursing shortage, the short-

age of available apartments and the limited financial resources available to hospitals, chapter 940 promotes the public welfare by providing it with apartments which might not otherwise be available. Without characterizing it as such, Lenox Hill is advancing a health care emergency argument. It should be noted that the Legislature has never declared a health care emergency. Nor has Lenox Hill cited any legislative history to support its theory as to what ills the statute was intended to cure. Moreover, chapter 940 is a provision of the Rent Stabilization Law, which was enacted to ameliorate a housing emergency, not to promote health care. Emergency legislation should not be extended beyond the problem sought to be remedied. (*See, People ex rel. McGoldrick v. Regency Park*, 201 Misc 109, 111, *affd* 280 App Div 804, *affd* 305 NY 650.) "Nor should the policy of promoting better health care be furthered by interpreting the Rent Stabilization Law so as to exacerbate the very housing emergency which rent stabilization was enacted to address." (*520 E. 81st St. Assoc. v. Lenox Hill Hosp., supra,* 157 AD2d at 150.)

With respect to the claim that chapter 940 was intended to help it "retain and attract staff", Lenox Hill does not need below-market rent stabilized apartments to attract nurses; it needs apartments, which it can obtain by making a capital investment in housing. Thus, what is at stake here is not Lenox Hill's ability to attract nurses but, rather, the cost of doing so. In that regard, it stresses the fact that it is "entirely dependent on government health care reimbursement rates." Lenox Hill, however, fails to show how the enormous and complex problem of health care costs will be solved by saving one hospital the difference between rent stabilized rents and market rents for a handful of apartments. There is no showing in this record as to how many apartments, other than the 54 leased by Lenox Hill, are affected by chapter 940.

In *Nollan v. California Coastal Commn., supra,* (483 US 825), the Supreme Court emphasized the level of scrutiny that must be applied in weighing the "legitimate state interest" test. "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved,

not that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective.' " (*Id.*, at 836, n3 [citation omitted], quoting Brennan, J.'s dissent, *id.*, at 843, quoting *Minnesota v. Clover Leaf Creamery Co*, 449 US 456, 466.) Recent Supreme Court cases have bolstered the view that a heightened scrutiny is applicable to a claim of legitimate state interest in takings claims. In *Lucas v. South Carolina Coastal Council*, ___ US___, 112 S Ct 2886), the court held that a legislative claim of advancing a legitimate state interest could not be taken at face value when analyzing whether a regulatory taking had occurred. "Since [a harm-preventing] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." (*Id.*, at 2898, n12.)

Finally, even if chapter 940 could be considered as substantially advancing a legitimate State interest by alleviating a health care crisis, there is no justification for placing the burden of such remedial legislation on this owner and others similarly situated, who would thereby be compelled to " 'dedicate their properties to a public purpose' and bear a public burden which should be borne by society at large." (*520 E. 81st St. Assocs. v. Lenox Hill Hosp, supra*, 157 AD2d at 149, quoting *Seawall Assocs. v. City of New York, supra*, 74 NY2d at 114, 115.) If the Legislature determines to provide inexpensive housing for hospital employees it may, of course, subsidize Lenox Hill or its nurses in a variety of ways. But if it shifts the burden of that subsidy to individuals rather than the public at large, it must do so within constitutional limits.

Although, under this analysis, there is no need to reach the second prong of the regulatory takings test, whether chapter 940 deprives the owner of the economically viable use of his property, any interpretation of chapter 940 that requires the owner to offer Lenox Hill renewal leases in perpetuity extinguishes the owner's reversionary interest in the property, i.e., its eventual recovery of the apartments to use as it sees fit. "Even in rent-regulated apartments, a landlord has a reason-

able expectation, at some point, of a vacancy, which will result in a reversion of possession to him." (*520 E. 81st St. Assocs. supra,* at 150.) As was said of chapter 940 in *Lenox Hill I*): "If only a single element of an owner's 'bundle of property rights' is extinguished, there has been a regulatory taking under [this] prong. (*See, Hodel v. Irving,* 481 US 704; *see also, Seawall Assocs. v. City of New York, supra,* 74 NY2d, at 110.)" (*Id.*)

An owner who rents to an individual has the expectation, even with liberal succession rules, that an apartment will eventually revert back to his control. In fact, of the six nurse-subtenants in possession of these apartments in December 1972, only one is in occupancy today. The other apartments have had multiple occupants. But, while individual tenants will die or move away, Lenox Hill, in existence over 75 years, since June 29, 1918, will not. Thus, there is no merit to the argument, accepted by the IAS court, that under rent stabilization an owner is no more likely to realize a reversionary interest in an apartment rented to an individual than in one of the apartments rented to Lenox Hill. In *Rent Stabilization Assn. v. Higgins* (164 AD2d 283, 298), this court, in another context, pointedly observed that while a landlord who rents to Lenox Hill is deprived of its reversionary interest in perpetuity, the use of the property in perpetuity by an individual tenant "is simply not a potential result."

Nor is there any merit to Lenox Hill's argument that the owner has not lost its reversionary interest because rent regulation is not permanent. Among the provisions of Local Law No. 9 invalidated in *Seawall Assocs. v. City of New York, supra* (74 NY2d 92), was a five-year moratorium on the conversion, alteration and demolition of single room occuapncy [sic] properties. As with the Rent Stabilization Law, the moratorium provided for subsequent renewals, "as the City Council deems necessary" (*id.*, at 100). Despite the "temporary" nature of the enactment, the Court of Appeals found a taking, both physical and regulatory. As a practical matter, as with Lenox Hill's existence, there seems to be no foreseeable end to rent regulation. Ironically, the cases cited by Lenox Hill in

support of the proposition that rent regulation is of temporary duration, i.e., *Loab Estates, Inc. v. Druhe* (300 NY 176), *Teeval Co. v. Stern* (301 NY 346) and *Lincoln Bldg. Assocs. v. Barr* (1 NY2d 413), were decided in 1949, 1950 and 1956, respectively.

In the normal lease arrangment, even under rent stabilization, an owner has the right to reenter his own property, to rehabilitate vacant apartments and increase rents in accordance with stabilzation guidelines, combine adjoining apartments and raise the rent to market rates, subject thereafter to stabilization guidelines, and to utilize vacant apartments for the personal use of family members. Here, the owner's future right to reassert its domain over the property with respect to any of these rights is lost.

Lenox Hill argues that an owner's reversionary interest in a rent stabilized apartment is too limited to constitute a sufficient component of an owner's property rights as to be independently the subject of an economic viability deprivation. A taking, it argues, must be measured by the impact of the restriction upon the property as a whole. The right to exclude others, however, has always been considered " 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " (*Hodel v. Irving*, 481 US 704, 716, quoting *Kaiser Aetna v. United States*, 444 US 164, 176.) *Hodel* involved the abrogation of an owner's "right to pass on property" to his heirs. In language equally pertinent here, the court held, "Of course, the whole of appellees' decedents' property interests were not taken by [the statute]. Appellees' decedents retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*. There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right." (*Id.*, at 715.)

Penn Central Transp. Co. v. City of New York (438 US 104), relied upon by Lenox Hill on this point, does not support its argument that to be deemed a taking a statute must affect the economically viable use of the property as a whole. The *Penn Central* court's reasoning that " '[t]aking' jurispru-

dence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated" refers to distinct physical segments of a particular parcel of land, which is consistent with its conclusion that there was no taking merely by virtue of the impaired value of the air rights above Grand Central Station (*id.*, at 130). The court was not referring to temporal interests in property, such as the reversionary interest involved here, which has, for centuries, been recognized as a discrete estate in Anglo-American law. (*See*, Powell, *Real Property* §266[1], at 19-17.) Lenox Hill's reliance on *Keystone Bituminous Coal Assn. v. DeBenedictis, supra* (480 US 470) is misplaced for the same reason. In *Keystone*, the challenged statute regulated only some of the physical elements of the property, i.e., the surface support area. Unlike here, a discrete temporal property interest was not involved.

More to the point, with respect to the argument that an owner's reversionary interest in rental apartments is not a sufficient component of property rights to support a deprivation of "economically viable use" in a regulatory takings claim, it is well settled that the three most essential elements of property ownership are the rights to " 'possess, use and dispose." (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 435, quoting *United States v. General Motors Corp.*, 323 US 373, 378; *Seawall Assocs. v. City of New York, supra*, 74 NY2d at 108.) The permanent deprivation of an owner's right to reenter and select the next tenant clearly implicates the right to possess and use.

In distinguishing this case from *Lenox Hill I*, the IAS court cited the fact that, unlike here, the reversionary interest there related to the right to dispose of condominium units, which had a measurable, quantifiable market value. This argument confuses the property right taken, as for instance, an owner's reversionary interest, with the monetary measure of the property right confiscated. The question of whether a taking has occurred is one issue; if it has, a separate inquiry is required to determine the appropriate compensation. (*See, Loretto v. Teleprompter Manhattan CATV Corp., supra*, 458 US at 441.)

While the value of the reversionary interest may be measured differently in the two cases, a taking nonetheless has occurred in both instances.

Lenox Hill, supported by the Attorney General, and citing *Matter of Cale Dev. Co. v. Conciliation & Appeals Bd.* (94 AD2d 229, *affd* 61 NY2d 976), *Koenig v. Jewish Child Care Assn.* (107 AD2d 542, *affd* 67 NY2d 955) and *Matter of Schwartz Landes Assocs. v. New York City Conciliation & Appeals Bd., supra* (117 AD2d 74) argues that it is entitled to renewal leases and the protection of the Rent Stabilization Law, without regard to chapter 940, on the basis of well established precedent which protects legitimate corporate tenancies as long as the subject premises are, in fact, utilized as the primary residence of the intended occupants.

This argument begs the question. In none of these cases did the court address the issue in terms of the "takings clause," which, in my view, is implicated whenever rent regulation provisions are interpreted so as to require the offer of renewal leases in perpetuity to a corporate tenant since such an interpretation deprives the landlord of an economically viable use of its property by abrogating the landlord's reversionary interest. Thus, quite apart from chapter 940, a regulatory taking would occur in this case. While no takings argument was made in *Cale*, which held that a corporate tenant was entitled to a renewal where the lease designated a specific individual and that individual actually used the apartment as his primary residence, the court did observe that "rent stabilization was never intended to place [a corporate tenant's] leasehold estate in perpetual trust for the benefit of whomever, at a particular point in time, might happen to occupy a corporate office" (94 AD2d at 234-235).

Finally, Lenox Hill argues that the owner is estopped from challenging the constitutionality of chapter 940 because it took full advantage of the 15% supplemental rent increase provided therein to landlords who lease apartments to not-for-profit hospitals for use by their staff. In its estoppel argument Lenox Hill invokes the general rule that a party may not obtain a benefit under a statute and later challenge the

statute's constitutionality. While the rule is correctly stated, its applicability is limited to those instances where a party has voluntarily subjected itself to the statute's application; it does not apply where as here, the statute's coverage has been thrust upon the party. *Fahey v. Mallonee* (332 US 245) illustrates the point. There, the plaintiffs, who had voluntarily formed a banking organization under section 5 of the Home Owner's Loan Act of 1933, thereafter challenged the constitutionality of section 5(d), which authorized the Federal Home Loan Bank Board to prescribe regulations for the reorganization, consolidation, merger or liquidation of building and loan associations with the power to appoint a conservator. Rejecting the challenge, the Court noted, "It would be intolerable that the Congress should endow an Association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection." (*Id.* at 256; *see, also, State Div of Human Rights v. State of New York*, 62 AD2d 617, *appeal dismissed* 46 NY2d 939; *Armour Handcrafts v. Miami Decorating & Design Center*, 99 AD2d 521.) The distinction here is obvious. The owner, having acquired the building in question seven years before the enactment of chapter 940, did not voluntarily elect to be subject to its provisions.

Thus, in my view, the IAS court's interpretation of chapter 940 effects an unconstitutional taking of property without just compensation. Chapter 940 should be interpreted in a manner which brings it into harmony with the Constitution. (*People v. Dietze*, 75 NY2d 47, 52.) For the reasons expressed in *Lenox Hill I* (157 AD2d, at 151-153), I would interpret chapter 940 as requiring the owner to offer renewal leases to the Lenox Hill employees who occupied the subject apartments as their primary residences at the expiration of their most recent renewal leases. As was said in *Lenox Hill I*, "Such an interpretation results in the continued occupancy of these apartments by those persons occupying them as their primary residence for as long as they continue to do so. Since the renewal lease is offered to persons, rather than to Lenox Hill,

an institution with a virtually limitless existence, [the owner] has a reasonable expectation of a vacancy at some point. When such a vacancy occurs, it can exercise the prerogatives of ownership and determine how the property is to be used." (*Id.*, at 153.)

Accordingly, I would reverse, grant plaintiffs' motion for summary judgment on the first and second causes of action and declare in the owner's favor in accordance with the foregoing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: September 21, 1993

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Clerk

SUPREME COURT : NEW YORK COUNTY
IAS PART 14

Index No.
24431/91

AMIR MANOCHERIAN, ROSITA MANOCHERIAN, ALAN MANOCHERIAN, ROBERT MANOCHERIAN and BARBARA MANOCHERIAN d/b/a FAME COMPANY,

Plaintiffs,

—against—

LENOX HILL HOSPITAL, a New York Not-For-Profit Corporation, THE STATE OF NEW YORK, T. O'CONNOR, C. ROGERS, D. HUCZEL, K. MOORE and M. KOLAN,

Defendants.

MYRIAN J. ALTMAN, J.:

In this consolidated action,[1] plaintiffs move for summary judgment in the form of a declaration that they are not required to offer renewal leases to defendant Lenox Hill Hospital (Lenox Hill) for six rent-stabilized apartments occupied by Lenox Hill employees. Plaintiffs challenge the constitutionality of Chapter 940, Laws of 1984 which amended the Rent Stabilization Law so as to require landlords to provide renewal leases to not-for-profit hospitals based on the primary

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[1] Plaintiffs moved for consolidation and for summary judgment in the separate action, *Manocherian v Lenox Hill Hospital* (index no. 1624/92). The parties stipulated to consolidate the two cases under index number 24431/91. The summary judgment motions are thus also consolidated for determination herein.

residency status of the hospital's employee-subtenant, rather than on the primary residency status of the tenant of record.

Both the State of New York and Lenox Hill cross-move for summary judgment, while Lenox Hill also cross-moves for leave to amend its answer to plead the affirmative defense of estoppel.

Plaintiffs own an apartment building located at 420 East 79th Street in Manhattan, which they purchased in 1976. During the 1960's Lenox Hill, a not-for-profit corporation and a private hospital, entered into leases for 18 apartments in plaintiffs' building for the purpose of subletting them to its employees, primarily nurses. Lenox Hill obtained regular lease renewals over the years on most of the apartments and presently is the tenant of record for a total of 15 apartments, all of which are subject to the Rent Stabilization Law.

Six of the leases have expired and notices of non-renewal of the leases have been served on Lenox Hill and the subtenants in residence. Apparently all but one of the apartments are occupied at the present time by Lenox Hill employees, although not the same employees who occupied the apartments as of the date of the last lease renewal. One apartment is allegedly vacant.

In an effort to prevent tenants from profiteering by subletting their rent-stabilized apartments, the Legislature enacted the Omnibus Housing Act of 1983 which added § 226-b to the Real Property Law and amended the Rent Stabilization Law. Pursuant to this new legislation, tenants were required to obtain the landlord's consent prior to subletting. The amount of rent a subtenant could be charged and the term of a sublease were also restricted (McKinney's Uncons Laws of NY § 26-511 [Rent Stabilization Law § 26-511]).[2] The Omnibus Housing Act further provided that the protections of the Rent Stabilization Law would be available only to a tenant named in the lease occupying an apartment as his or her primary residence, a definition which did not extend to subtenants or other occupants (Rent Stabilization Law § 26-

[2] Unless otherwise noted, all references are to the present statutory sections which were renumbered effective September 1, 1986.

504[a][1][f]). Thus, a landlord was no longer required to offer a renewal lease to a tenant of record who was not using the apartment as his or her primary residence.

The Legislature recognized that this restriction would adversely affect a corporate tenant such as Lenox Hill which does not use the apartments it rents as its primary residence, but subleases them to individuals who do. Therefore, it passed Chapter 940 of the Laws of 1984, amending § 8625(a)(11) of the Emergency Tenant Protection Act and Administrative Code § YY51-3.0 (renum § 26-504[a][1][f]). The amendments provided, *inter alia*:

> For the purposes of this subparagraph where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants . . .

Administrative Code § YY51-6.0 (renum § 26-511[c][12]) was also amended to provide that "a not-for-profit hospital shall have the right to sublet any housing accommodation leased by it to its affiliated personnel without requiring the landlord's consent". The amended section also restricted the landlord's right to limit the term of the sublease and provided that

> whenever a not-for-profit hospital executes a renewal lease for a housing accommodation, the legal regulated rent shall be increased by a sum equal to fifteen percent of the previous lease rental for such housing accommodation, hereinafter referred to as a vacancy surcharge, unless the landlord shall have received within the seven year period prior to the commencement date of such renewal lease any vacancy increases or vacancy surcharges allocable to the said housing accommodation

(Rent Stabilization Law § 26-511[c][12]).

By these amendments, the Legislature sought to ensure that not-for-profit hospitals could continue to supply their employees with affordable, convenient housing by regular renewal of

rent-stabilized leases. At the same time, the landlord would be allowed to recoup, in the form of a 15% vacancy surcharge, rent increases which might have been available had the apartments become vacant, rather than continuing to be rented under an uninterrupted series of renewal leases.

As a corporation in existence since 1917, Lenox Hill allegedly has a perpetual existence and will, presumably, always have employees in need of housing. Thus, plaintiffs claim that Chapter 940 entitles Lenox Hill to "perpetual renewal leases" for apartments it does not occupy thereby depriving plaintiffs of any "reasonable expectation of regaining possession of the apartments upon vacatur of the occupants." Plaintiffs challenge the constitutionality of Chapter 940 claiming that the alleged loss of their reversionary interest in the apartments constitutes a taking without just compensation.

Lenox Hill maintains that plaintiffs are estopped from challenging the constitutionality of Chapter 940 because, in collecting the 15% vacancy surcharge, plaintiffs have availed themselves of the benefits of the statute and cannot now object to it on constitutional grounds. Because estoppel was not affirmatively pleaded in the answer served by Lenox Hill, permission to amend that answer is sought.

Leave to amend pleadings should be freely given, in the absence of prejudice or surprise (CPLR 3025[b]; Blasch v Chrysler Motors Corp., 93 AD2d 934), neither of which has been shown. Leave to amend will not be granted, however, where the proposed amendment is without merit (Megaris Furs v Gimbel Bros., 172 AD2 209).

While it has been stated that " 'one who partakes of advantages which a statute affords is ordinarily barred from attacking the statute on constitutional grounds' [citations omitted]" (State Div. of Human Rights v State of New York, Executive Dept., Div. of State Police, 62 AD2d 617, 626, appeal dismissed 46 NY2d 939), that general rule is apparently no longer viable (see, Matter of Kovarsky v Housing & Development Admin. of City of N.Y., 31 NY2d 184, 192; Matter of Lemp v Town Bd. of Town of Islip, 90 Misc 2d 360). There-

fore, I find no merit to Lenox Hill's estoppel argument and leave to amend its answer is denied.

The Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that there shall be no taking of private property for public use without just compensation. This constitutional guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (Penn Cent. Transp. Co. v New York City, 438 US 104, 123, citing Armstrong v United States, 364 US 40, 49). No set test has been developed to determine when compensation will be due as a result of the imposition of governmental restrictions on property, although the "economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance" (Loretto v Teleprompter Manhattan CATV Corp., 458 US 419, 426). A taking "may more readily be found when the interference with property can be characterized as a physical invasion by government" (Penn Cent. Transp. Co. v New York City, *supra*, at 124) or where " 'the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership' " (Seawall Assocs. v City of New York, 74 NY2d 92, 102, cert denied 493 US 976, quoting Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv L Rev 1165, 1184 [1967]).

A "physical taking" of property by government action compels the property owner to "surrender the most basic attributes of private property, the rights of possession and exclusion" (Seawall Assocs. v City of New York, *supra*, at 102). Where government action results in a permanent physical occupation of property, there is a taking " 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner' " (Nollan v California Coastal Commn., 483 US 825, 831-832, citing Loretto v Teleprompter Manhattan CATV Corp., *supra*, at 434-435).

Governmental regulation of property falling short of a physical taking may nevertheless amount to a "regulatory taking": "(1) if it denies an owner economically viable use of his property, *or* (2) if it does not substantially advance legitimate State interests" (Seawall Assocs. V City of New York, *supra,* at 107 [emphasis in original]).

In claiming that Chapter 940 is unconstitutional, plaintiffs rely heavily on the decision of the Appellate Division, First Department in *520 E. 81st St. Assocs. v Lenox Hill Hosp.* (157 AD2d 138, revg 142 Misc 2d 723, revd on other grounds 77 NY2d 944). The Appellate Division addressed the constitutionality of Chapter 940 in an action between a landlord and Lenox Hill which parallels the facts of this case, except that the apartment building in *520 E. 81st St. Assocs.* had undergone conversion to a condominium form of ownership. The Supreme Court had found that Lenox Hill was entitled to renewal leases as the intended beneficiary of Chapter 940 and because the plaintiff landlord, unlike plaintiffs herein, had failed to provide proper statutory notice of its intention not to offer renewal leases (142 Misc 2d at 725). The IAS court declined to address the constitutional issue because the Attorney General had not been notified of the challenge, as is required by law (*id.*, at 726).

The Appellate Division reversed the IAS court and addressed the constitutionality of Chapter 940. The Court found that both a physical and regulatory taking would result if Lenox Hill were entitled to renewal leases. A physical taking was found to arise because Lenox Hill's corporate existence, its need for employee housing and its right to renewal leases were virtually perpetual, resulting in the permanent loss to plaintiff of its right to decide who occupies the property and on what terms and depriving plaintiff permanently "of the opportunity to sell the apartments free and clear of tenancies" (157 AD2d at 147-148).

The Appellate Division found a regulatory taking in that Chapter 940 "fails to advance, and indeed contravenes, the purpose of the Rent Stabilization Law to which it relates" (*id.*, at 149) because it permits Lenox Hill, as tenant of record, to

dislodge subtenants no longer employed by the hospital. Further, application of Chapter 940 to Lenox Hill "deprives the owner of the value of an important single element in its bundle of property rights, namely, the expectation of a residual/reversionary interest in these apartments, which has now been lost" (*id.*, at 150). Consequently, the owner was deprived of the resale value of the apartments (*id.*, at 151).

However, in an effort to sustain the constitutionality of Chapter 940, the Court rejected the IAS court's interpretation of the statute as requiring the landlord to offer renewal leases to Lenox Hill. Rather, the Appellate Division found that the statute required the landlord to offer renewal leases to Lenox Hill's subtenants, if they met the requirement of primary residency (*id.*, at 153). Since the renewal leases would be offered to individuals, rather than Lenox Hill, the plaintiff would have a reasonable expectation of vacancies at some time. The Court rejected Lenox Hill's argument that it was entitled to a renewal lease because the plaintiff had failed to serve a proper notice of nonrenewal.

The Appellate Division decision was reversed by the Court of Appeals (77 NY2d 944) which found that the landlord's failure to provide the statutory notice of nonrenewal required it to offer Lenox Hill renewal leases. Therefore, it was unnecessary for the Court to address the constitutional issue and the decision of the IAS court was reinstated.

Consequently, the Appellate Division's decision is not binding precedent, although it is, of course, entitled to serious consideration (see, 29 NY Jur 2d, Courts & Judges, § 483). There are two distinguishing factors present in this case which now compel a finding of constitutionality. After the Appellate Division rendered its decision, the Supreme Court of the United States decided a case entitled *Yee v City of Escondido* (___ US ___, 118 L Ed 2d 153). *Yee* effectively overruled *Hall v City of Santa Barbara* (797 F2d 1493, opn amended 833 F2d 1270, cert denied 485 US 940), one of the cases relied on by the Appellate Division in finding a physi-

cal taking. Additionally, this case involves a rental property whereas *520 E. 81st St. Assocs.* involved a condominium.[3]

The case of *Yee v City of Escondido* (*supra*) involved a challenge to a mobile home rent control ordinance brought by mobile home park owners. The local ordinance rolled back the rents that owners could charge for the rental of "pads" for mobile homes and prohibited rent increases without the City Council's approval. The local ordinance was passed after enactment of state legislation which strictly limited the bases upon which an owner could terminate a mobile home tenancy. The owner could not require removal of a mobile home when sold, charge a transfer fee for the sale or disapprove of a purchaser, unless the purchaser was unable to pay the rent. The purchaser could continue to rent the pad. The owners argued that, because of the state law, the local ordinance effectively deprived them of the use of their property and gave tenants and their successors the right to permanently occupy the property. The Supreme Court rejected the owners' argument and found that the ordinance did not result in a physical taking.[4]

In *Seawall Assocs. v City of New York* (*supra*), the regulation under scrutiny prevented owners of single-room occupancy (SRO) housing from demolishing their buildings and required them instead to rehabilitate their properties and lease every unit to "bona fide" tenants or risk substantial penalties. Alternatively, owners could purchase exemptions for a large fee. The Court of Appeals found that the SRO owners would be "forced" by the government to rent their properties to strangers, a compelling case for finding a physical taking. The *Seawall* Court contrasted the SRO owners' loss of their "fundamental rights to possess and to exclude" with "rent control and other landlord-tenant regulations" that had been upheld which "merely involved restrictions imposed on existing ten-

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[3] Further, by reinstating the lower court decision, the Court of Appeals apparently also approved the finding of the IAS court that renewal leases are to be offered to the hospital and not to the subtenants.

[4] For procedural reasons, the Court did not consider whether there was a regulatory taking.

ancies where the landlords had voluntarily put their properties to use for residential housing" (*id.*, at 105).

In *Yee* (*supra*), the Supreme Court reiterated that the regulation of a landlord-tenant relationship voluntarily entered into by the owner, and not forced upon it by the government, does not create a physical taking because such a relationship lacks the "required acquiescence" which "is at the heart of the concept of occupation" (*id.*, at 165).

Unlike the owners in *Seawall* or in *Loretto v Teleprompter Manhattan CATV Corp.* (*supra*),[5] plaintiffs herein voluntarily opened their premises to the occupancy to which they now object. They were not compelled to become residential landlords, but rented their apartments to Lenox Hill knowing that they would be occupied by hospital employees. Chapter 940 does not force plaintiffs to open their property to strangers, but rather, compels them to continue to lease the apartments to their chosen tenant as long as requirements of primary residency are met, just as in the case of an individual tenant in occupancy. Plaintiffs may be deprived of the ability to select a particular subtenant, but they have not been deprived of any opportunity to sell the apartments free of tenancies since this is a rental building (compare, 520 E. 81st St. Assocs. v Lenox Hill Hosp., 157 AD2d at 148).

The right to exclude is "one of the most treasured strands in an owner's bundle of rights" (Loretto v Teleprompter Manhattan CATV Corp., *supra*, at 435). Plaintiffs claim that Chapter 940 wrests from them their right to exclude. In actuality, since plaintiffs voluntarily opened their property to occupancy by others, they "cannot assert a per se right to compensation based on their inability to exclude particular individuals" (*Yee v City of Escondido, supra*, at 167). Regulations which require a landowner to accept tenants he or she does not like or which restrict the amount of collectible rents, such as Chapter 940, do not amount per se to a physical taking (see, *id.*, at 166).

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[5] In *Loretto*, the owner was required by law to permit a cable television company to install cable equipment on her property.

Plaintiffs have failed to show the loss in perpetuity of their reversionary interest in their property or that the statute requires them to "refrain in perpetuity from terminating a tenancy", which could amount to a physical taking (*Yee v City of Escondido, supra,* at 166). Plaintiffs have not demonstrated that any of the avenues for changing the use of their property, such as proposed occupancy by the owners themselves, have been closed to them or that they "are not in fact free to change the use of their land" (*id.,* at 165; compare, Seawall Assocs. v City of New York, *supra*). The fact that an apartment is occupied by an individual tenant of record rather than by a subtenant of a not-for-profit hospital of potentially perpetual existence does not guarantee that the apartment will ever become vacant. The Rent Stabilization Law allows continuing occupancy by primary resident tenants and their family members under circumstances which might very well be perpetual. On the other hand, it also provides for the loss of a nonprofit hospital's renewal rights if its subtenants fail to meet the test of primary residency or if the apartments are vacant during the crucial period, so that no subtenant exists whose residency must be addressed. Further, plaintiffs' reversionary interest here does not include the right to sell the apartments. Plaintiffs would continue to rent the apartments at issue, even if Lenox Hill were not the tenant of record.

For all of the above reasons, I find that Chapter 940 does not effect a physical taking (see, *Yee v City of Escondido, supra*).

Determination of whether a regulatory taking has occurred requires "essentially ad hoc, factual inquiries" (Penn Cent. Transp. Co. v New York City, *supra,* at 124; *Yee v City of Escondido, supra*). Regulation which goes too far will be recognized as a taking (*Yee v City of Escondido, supra,* at 166, citing Pennsylvania Coal Co. v Mahon, 260 US 393, 415). Land use regulation will not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his or her land (Nollan v California Coastal Commn., *supra,* at 834). A use restriction may constitute a taking if it is not reasonably necessary to

effectuate a substantial government purpose, although a broad range of governmental purposes are acceptable (*id.*, at 834-835). Legislative enactments carry a strong presumption of constitutionality and a court should not concern itself with questions of "reasonableness, wisdom and propriety" (Lincoln Bldg. Assocs. v Barr, 1 NY2d 413, 415, appeal dismissed 355 US 12). The party challenging the statute has the burden of rebutting this presumption (*id.*, at 418). In this case, plaintiffs have failed to do so.

A principal goal of the Rent Stabilization Law is to curb oppressive conduct and profiteering by landlords (see, Rent Stabilization Law § 26-501). That goal is advanced by providing protection to Lenox Hill and its employees. A landlord should not be permitted to rent its premises to a nonprofit entity such as Lenox Hill and then be heard to complain that it had not foreseen the occupancy of the property by the very persons intended by the lease to occupy the premises. Further, Chapter 940 promotes the general health and welfare of the public that the Rent Stabilization Law, which addressed the housing shortage in the City, was designed to protect. During what is considered to be a continuing emergency in the residential rental market, the legislation permits nonprofit hospitals to obtain housing for their medical personnel which might not otherwise be available. There is no question but that the apartments are in fact rented to hospital employees. Thus, it is ultimately residential tenants who are being protected. Consequently, I find a sufficiently "close nexus" between the regulation and the end sought to be accomplished by the Rent Stabilization Law (compare, Seawall Assocs. v City of New York, *supra*, at 111).

As previously indicated, the Omnibus Housing Act of 1983 was enacted, in part, to prevent tenant profiteering. Lenox Hill is not using the apartments to make a profit. Therefore, it was reasonable for the Legislature to exempt nonprofit hospitals such as Lenox Hill from the 1983 restrictions.

Consequently, I find that plaintiffs have failed to demonstrate that Chapter 940 does not further the purposes of the Rent Stabilization Law and that, in fact, the legislation does

substantially promote legitimate state interests (but see, 520 E. 81st St. Assocs. V Lenox Hill Hosp., 157 AD2d 138, *supra*).

Nor have plaintiffs demonstrated that they have been denied economically viable use of their property. As previously discussed, plaintiffs have not shown that they have been deprived of their reversionary interest in the apartments any more so than if the apartments were rented to individuals. There has been no showing that the value of any reversionary interest in a rent-stabilized apartment is substantially less when the tenant is a not-for-profit hospital as opposed to an individual. Plaintiffs have collected and will continue to collect a surcharge, otherwise unavailable to a landlord when an apartment is continually occupied by the same rent-stabilized tenant.

Further, plaintiffs did not invest in this property with the expectation of selling the units (compare, 520 E. 81st St. Assocs. v Lenox Hill Hosp., 157 AD2d at 151). They are not presently seeking to sell the apartments, but to rerent them. Plaintiffs purchased the building with knowledge of Lenox Hill's leases and prior to the enactment of the Omnibus Housing Act of 1983. Chapter 940 was passed shortly after the 1983 legislation went into effect. The brief period of time between the enactment of the 1983 and 1984 laws was insufficient to give rise to any reasonable expectation of recovering the apartments. Thus, plaintiffs have not been frustrated in their "distinct investment-backed expectations" (see, Penn Cent. Transp. Co. v New York City, *supra*, at 124).

Plaintiffs have not expressed any desire to alter the use of their property, nor have they claimed that Chapter 940 prohibits them from doing so (compare, Seawall Assocs. v City of New York, *supra*). Chapter 940 merely restricts plaintiffs' conduct; it does not affirmatively require them to "dedicate their properties to a public purpose" (compare, *id.*, at 114). Plaintiffs have not demonstrated that the law denies them the full use of their property or a reasonable return on their investment (see, *id.*, at 108-109). Consequently, I find that Chapter 940 does not effect a regulatory taking.

Finally, plaintiff's claim that apartment 16-G was unoccupied when the lease for that apartment expired is uncontroverted. Thus, they seek a final judgment of possession for the apartment. However, it appears that the apartment was occupied by a Lenox Hill employee during the crucial 30-day notice period for the offering, or refusal, of a renewal lease. Chapter 940 has made the subtenant in occupancy the party whose primary residency status controls Lenox Hill's right to renew. The landlord bears the burden of proving that grounds for removal existed during the 30-day notice period, not after the lease expired. Thus, the primary residency of Lenox Hill's subtenant as of the time of the notice of nonrenewal would have to be considered (see, Keller v Panneton, 121 Misc 2d 381). The facts concerning that person's entire residency would have to be reviewed to determine Lenox Hill's right to renewal (see, Ansonia Assocs. v Consiglio, 163 AD2d 98). Since plaintiffs have not alleged that any of the Lenox Hill subtenants, much less the former occupant of 16-G, did not occupy their apartments as their primary residences, plaintiffs are not entitled to a judgment of possession for apartment 16-G and have no grounds on which to deny Lenox Hill renewal leases to any of the apartments.

Accordingly, plaintiffs' motions for summary judgment are denied and defendants' cross-motions are granted. Lenox Hill's cross motion seeking leave to amend is denied. As to plaintiffs' first and second causes of action in each of the complaints, defendants are entitled to a declaration that Chapter 940, Laws of 1984 is constitutional and a declaration that Lenox Hill is the primary resident of the apartments in issue and is entitled to renewal leases. All the remaining causes of action in this consolidated action are dismissed. Lenox Hill is not entitled to recover attorneys' fees as sought in its counterclaims (see, Peck v Wolf, 157 AD2d 535, lv to appeal denied 75 NY2d 709) and therefore the counterclaims are dismissed.

Settle order and judgment.

Dated: July 6, 1992

J. S. C.

UNITED STATES CONSTITUTION

The Takings Clause of the Fifth Amendment of the United States Constitution provides:

> [N]or shall private property be taken for public use without just compensation.

LAWS OF NEW YORK

EMERGENCY TENANT PROTECTION ACT

Memorandum relating to this chapter, see Executive Memoranda, post

CHAPTER 403

Approved June 30, 1983, effective as provided in section 64

Passed on message of necessity. See Const. Art. IX, § 2(b)(2), and McKinney's Legislative Law § 44

* * *

§ 41. Subdivision a of section YY51-3.0 of the administrative code of the city of New York, as amended by chapter five hundred seventy-six of the laws of nineteen hundred seventy-four, the opening paragraph as amended by chapter five hundred fifty-five of the laws of nineteen hundred eighty-two, is amended to read as follows:

a. Class A multiple dwellings not owned as a cooperative or as a condominium, except as provided in section three hundred fifty-two-eeee of the general business law, containing six or more dwelling units which:

(1) were completed after February first, nineteen hundred forty-seven, except dwelling units (a) owned or leased by, or financed by loans from, a public agency or public benefit corporation, (b) subject to rent regulation under the private housing finance law or any other state law, (c) aided by government insurance under any provision of the National Housing Act,[1] to the extent this local law or any regulation or order issued thereunder is inconsistent therewith, or (d) located in a building for which a certificate of occupancy is obtained after March tenth, nineteen hundred sixty-nine; or (e) any class A multiple dwelling which on June first, nine-

[1] 12 U.S.C.A. § 1701 et seq.

teen hundred sixty-eight was and still is commonly regarded as a hotel, transient hotel or residential hotel, and which customarily provides hotel service such as maid service, furnishing and laundering of linen, telephone and bell boy service, secretarial or desk service and use and upkeep of furniture and fixtures, or (f) not occupied by the tenant, not including subtenants or occupants, as his primary residence, as determined by a court of competent jurisdiction, provided, however that no action or proceeding shall be commenced seeking to recover possession on the ground that a housing accommodation is not occupied by the tenant as his primary residence unless the owner or lessor shall have given thirty days notice to the tenant of his intention to commence such action or proceeding on such grounds, or (g) became vacant on or after June thirtieth, nineteen hundred seventy-one, or become vacant, provided however, that this exemption shall not apply or become effective with respect to housing accommodations which the commissioner determines or finds became vacant because the landlord or any person acting on his behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including but not limited to, interruption or discontinuance of essential services) which interferred with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use or occupancy of the housing accommodations and provided further that any housing accommodations exempted by this paragraph (g) shall be subject to this law to the extent provided in subdivision b of this section; or (2) were decontrolled by the city rent agency pursuant to section Y51-12.0 of the city rent and rehabilitation law; or (3) are exempt from control by virtue of items (1), (2), (6) or (7) of subparagraph (i) of paragraph 2 of subdivision e of section Y51-3.0 of such law.

§ 64. This act shall take effect immediately except that sections two through twelve, fourteen, fifteen, sixteen, eighteen through thirty-five, forty-one and forty-two shall take effect April first, nineteen hundred eighty-four, section thirty-six shall take effect September first, nineteen hundred eighty-

three, section forty shall take effect August first, nineteen hundred eighty-three and provided that sections thirty-four and thirty-five shall apply to actions and proceedings commencing on and after the date on which such sections have become a law, that sections forty-four, forty-five, forty-eight and fifty-six shall apply to leases and renewals commencing on and after October first, nineteen hundred eighty-three and that the division of housing and community renewal may take required and appropriate actions for timely implementation of this act.

EMERGENCY TENANT PROTECTION ACT— SUBLETTING OF RESIDENCES BY NOT-FOR-PROFIT HOSPITALS

CHAPTER 940

Approved Aug. 6, 1984, effective as provided in section 5

AN ACT to amend the administrative code of the city of New York and the emergency tenant protection act of nineteen seventy-four, in relation to subletting of residences by not-for-profit hospitals

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subparagraph (f) of paragraph one of subdivision a of section YY51-3.0 of the administrative code of the city of New York, as amended by chapter four hundred three of the laws of nineteen hundred eighty-three, is amended to read as follows:

(f) not occupied by the tenant, not including subtenants or occupants, as his primary residence, as determined by a court of competent jurisdiction, provided, however that no action or proceeding shall be commenced seeking to recover possession on the ground that a housing accommodation is not occupied by the tenant as his primary residence unless the owner or lessor shall have given thirty days notice to the tenant of his intention to commence such action or proceeding on such grounds. For the purposes of this subparagraph (f) where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants, or

§ 2. Paragraph twelve of subdivision c of section YY51-6.0 of such code, as added by chapter four hundred three of the laws of nineteen hundred eighty-three, is amended to read as follows:

(12) permits subletting of units subject to this law pursuant to section two hundred twenty-six-b of the real property law provided that (a) the rental charged to the subtenant does not exceed the stabilized rent plus a ten percent surcharge payable to the tenant if the unit sublet was furnished with the tenant's furniture; (b) the tenant can establish that at all times he has maintained the unit as his primary residence and intends to occupy it as such at the expiration of the sublease; (c) an owner may terminate the tenancy of a tenant who sublets or assigns contrary to the terms of this paragraph but no action or proceeding based on the non-primary residence of a tenant may be commenced prior to the expiration date of his lease; (d) where an apartment is sublet the prime tenant shall retain the right to a renewal lease and the rights and status of a tenant in occupancy as they relate to conversion to condominium or cooperative ownership; (e) where a tenant violates the provisions of subparagraph (a) of this paragraph the subtenant shall be entitled to damages of three times the overcharge and may also be awarded attorneys fees and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five [thouand] thousand four of the civil practice law and rules; (f) the tenant may not sublet the unit for more than a total of two years, including the term of the proposed sublease, out of the four-year period preceding the termination date of the proposed sublease. The provisions of this subparagraph (f) shall only apply to subleases commencing on and after July first, nineteen hundred eighty-three; [and] (g) for the purposes of this paragraph only, the term of the proposed sublease may extend beyond the term of the tenant's lease. In such event, such sublease shall be subject to the tenant's right to a renewal lease. The subtenant shall have no right to a renewal lease. It shall be unreasonable for an owner to refuse to consent to a sublease solely because such sublease extends beyond the tenant's lease; and (h) notwithstanding the provisions of section two hundred twenty-six-b of the real property law, a not-for-profit hospital shall have the right to sublet any housing accommodation leased by it to its affiliated personnel without requiring the

landlord's consent to any such sublease and without being bound by the provisions of subparagraphs (b), (c) and (f) of this paragraph. Commencing with the effective date of this subparagraph, whenever a not-for-profit hospital executes a renewal lease for a housing accommodation, the legal regulated rent shall be increased by a sum equal to fifteen percent of the previous lease rental for such housing accommodation, hereinafter referred to as a vacancy surcharge, unless the landlord shall have received within the seven year period prior to the commencement date of such renewal lease any vacancy increases or vacancy surcharges allocable to the said housing accommodation. In the event the landlord shall have received any such vacancy increases or vacancy surcharges during such seven year period, the vacancy surcharge shall be reduced by the amount received by any such vacancy increase or vacancy surcharges.

§ 3. Paragraph eleven of subdivision a of section five of section four of chapter five hundred seventy-six of the laws of nineteen hundred seventy-four constituting the emergency tenant protection act of nineteen seventy-four, as amended by chapter four hundred three of the laws of nineteen hundred eighty-three, is amended to read as follows:

(11) housing accommodations which are not occupied by the tenant, not including subtenants or occupants, as his primary residence, as determined by a court of competent jurisdiction. For the purposes of this paragraph, where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants. No action or proceeding shall be commenced seeking to recover possession on the ground that a housing accommodation is not occupied by the tenant as his primary residence unless the owner or lessor shall have given thirty days notice to the tenant of his intention to commence such action or proceeding on such grounds.

§ 4. Section ten-a of such act, as added by chapter four hundred three of the laws of nineteen hundred eighty-three, is amended to read as follows:

§ 10-a. Right to sublease. Units subject to this law may be sublet pursuant to section two hundred twenty-six-b of the real property law provided that (a) the rental charged to the subtenant does not exceed the legal regulated rent plus a ten percent surcharge payable to the tenant if the unit sublet was furnished with the tenant's furniture; (b) the tenant can establish that at all times he has maintained the unit as his primary residence and intends to occupy it as such at the expiration of the sublease; (c) an owner may terminate the tenancy of a tenant who sublets or assigns contrary to the terms of this section but no action or proceeding based on the non-primary residence of a tenant may be commenced prior to the expiration date of his lease; (d) where an apartment is sublet the prime tenant shall retain the right to a renewal lease and the rights and status of a tenant in occupancy as they relate to conversion to condominium or cooperative ownership; (e) where a tenant violates the provisions of subdivision (a) of this section the subtenant shall be entitled to damages of three times the overcharge and may also be awarded attorneys fees and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules; (f) the tenant may not sublet the unit for more than a total of two years, including the term of the proposed sublease, out of the four-year period preceding the termination date of the proposed sublease. The provisions of this subdivision (f) shall only apply to subleases commencing on and after July first, nineteen hundred eighty-three; [and] (g) for the purposes of this section only, the term of the proposed sublease may extend beyond the term of the tenant's lease. In such event, such sublease shall be subject to the tenant's right to a renewal lease. The subtenant shall have no right to a renewal lease. It shall be unreasonable for an owner to refuse to consent to a sublease solely because such sublease extends beyond the tenant's lease; and (h) notwithstanding the provisions of section two hundred twenty-six-b

of the real property law, a not-for-profit hospital shall have the right to sublet any housing accommodation leased by it to its affiliated personnel without requiring the landlord's consent to any such sublease and without being bound by the provisions of subdivisions (b), (c) and (f) of this section. Commencing with the effective date of this subdivision, whenever a not-for-profit hospital executes a renewal lease for a housing accommodation, the legal regulated rent shall be increased by a sum equal to fifteen percent of the previous lease rental for such housing accommodation, hereinafter referred to as a vacancy surcharge, unless the landlord shall have received within the seven year period prior to the commencement date of such renewal lease any vacancy increases or vacancy surcharges allocable to the said housing accommodation. In the event the landlord shall have received any such vacancy increases or vacancy surcharges during such seven year period, the vacancy surcharge shall be reduced by the amount received by any such vacancy increase or vacancy surcharges.

§ 5. This act shall take effect immediately and shall apply to all actions and proceedings pending on the effective date of this act or commenced thereafter and provided further that the amendments to sections YY51-3.0 and YY51-6.0 of the rent stabilization law of nineteen hundred sixty-nine[1] made by sections one and two of this act shall expire on the same date as such law expires and shall not affect the expiration of such law as provided under section YY51-8.0 of such law and provided further that the amendments to sections five and ten-a of the emergency tenant protection act of nineteen seventy-four[2] made by sections three and four of this act shall expire on the same date as such act expires and shall not affect the expiration of such act as enacted by chapter five hundred seventy-six of the laws of nineteen hundred seventy-four, as last extended by chapter four hundred three of the laws of nineteen hundred eighty-three.

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1 McK.Unconsol.Laws §§ YY51-3.0; YY51-6.0

2 McK.Unconsol.Laws §§ 8625; 8630-a.